147 U.S. 14

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1892.

No. 9 (Original).

EX PARTE: IN THE MATTER OF HENRY MORRISON, PETITIONER.

RETURN OF THE HONORABLE THOMAS L. NELSON, JUDGE OF THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MASSACHUSETTS, TO THE RULE TO SHOW CAUSE WHY A WRIT OF PROHIBITION SHOULD NOT BE GRANTED.

FILED NOVEMBER 4 1892.

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1 Supreme Court of the United States.—October term, 1892.

Ex parte: In the matter of Henry Morrison, petitioner.

On consideration of the petition of Henry Morrison,

It is now here ordered by the court that cause be shown by the district court of the United States for the district of Massachusetts and the honorable Thomas L. Nelson, judge of said court, before this court at Washington, on the second Monday of November next, at 12 o'clock noon of that day or as soon thereafter as counsel can be heard, why a writ of prohibition should not be granted as prayed in said petition.

October 24th, 1892.

2 Supreme Court of the United States, October term, 1892.

Ex parte Henry Morrison.

To the honorable the Chief Justice and the Associate Justices of the Supreme Court.

In compliance with the order to show cause issued October 24th, 1892, a copy of which is hereto annexed, I, Thomas L. Nelson, judge of the district court of the United States, for the district of Massachusetts, respectfully make return as follows:

On the sixteenth day of August, 1892, a libel or petition was filed in said district court by the Metropolitan Steamship Company, a Massachusetts corporation, owner of the steamship H. F. Dimock, to limit its liability as such owner to the value of said steamship and the freight pending at the time therein mentioned, whereupon I caused due appraisement to be made of said steamship and freight, according to the usual course and practice of the said district court in such cases, by three persons known to me to be persons of integrity and of skill and experienced in such matters, and such appraisement was duly made and returned, and thereupon a stipulation to the action was duly filed by the petitioner and its sureties, and a monition was issued by me, returnable on the twenty-fifth day of November, 1892, and an order restraining suits and proceedings against said steamship and said petitioner was duly made and entered.

3 All which, and all other matters pertinent to this return will more fully appear by the copies hereto annexed of the docket entries, the record, and proceedings in said cause attested by the clerk of said district court.

And thereupon it is respectfully submitted whether or not this court shall take further proceedings in this cause.

Witness my hand this seventh day of November, 1892.

THOS. L. NELSON, *D. J.*

4 [No 382.]

The Metropolitan Steamship Company, petitioner, to limit liability of steamship H. F. Dimock.

(Damage.)

John Lowell,
John Lowell, jr.,
Wm. D. Sohier.

June T., 1892. Aug. 16. Libel filed and warrant to appraise isssued.
17. Warrant to appraise returned. Steamship, $80,000; pending frt., $2,395 33/100.
" Nelson, J. Order for stipulation for $82,395 33/100.
" Stipulation to the action given.
" Monition issued, returnable November 25th.
" Nelson, J. Restraining order issued.
27. " " Amendment to libel filed and allowed.

Sept. T., 1892. Oct. 28. Order of notice relating to petition for prohibition received and papers filed.
" Nelson, J. Ordered that the proctors for libellant be notified of their filing.
" Proctors for libellant duly notified as ordered.
" John Lowell, John Lowell, jr., and William D. Sohier appear for Judge Nelson.

United States district court, district of Massachusetts.

A true copy of the docket entries in the above-entitled cause.

In testimony whereof I have hereunto set my hand and affixed the seal of said court this 7th day of November, A. D. 1892.

[SEAL.] FRANK H. MASON,
Clerk.

5 United States district court, district of Massachusetts.

THE METROPOLITAN STEAMSHIP COMPANY (steamship H. F. Dimock) *vs.* WILLIAM K. VANDERBILT. } In admiralty.

To the honorable the judge of the district court of the United States within and for the district of Massachusetts:

The libel and petition of the Metropolitan Steamship Company, a corporation duly organized under the laws of the Commonwealth of Massachusetts, and having its principal place of business in Boston, in said Commonwealth, owner of the steamship H. F. Dimock, vs. William K. Vanderbilt, of the city, county, and State of New York, owner of the steamship Alva, in a cause of limitation of liability civil and maritime, alleges and articulately propounds as follows:

1st. That in the month of July, 1892, the said corporation, your petitioner, was and ever since has been the owner of the steamship H. F. Dimock, of about twenty-six hundred and twenty-six tons gross measure,

and the said corporation was engaged in the business of running a line of freight steamships between the said city of New York and the port of Boston, in this district, and that on the twenty-fourth day of said July said steamship was employed in said business on the high seas and within the ebb and flow of the tide and within the admiralty and maritime jurisdiction of this honorable court.

6 2nd. That on the twenty-fourth day of July, A. D. 1892, at about eight o'clock in the forenoon, the said steamship Dimock was on Nantucket shoals in Vineyard Sound on her way from Shovelfull light-ship to Pollock Rip light-ship on her passage from New York to Boston. That said steamship was going at half speed in a thick fog, and was proceeding very cautiously, stopping the engines occasionally, to listen for the bells on the light-ship, and for other vessels. She had double lookouts on the bow, and extra lookouts was whistling at short intervals from twenty to forty seconds apart, and was taking extraordinary precautions to prevent accidents and to keep in the channel.

At half past eight in the forenoon the engines were stopped to listen for the bell and for the whistle of Pollock Rip light-ship, and for other vessels. When the bell and whistle of said light-ship were heard, the Dimock took her departure for the Pollock Rip slue bell buoy.

The Dimock took her time at said light-ship and started up her engines at 8:31 o'clock under one bell or half speed, and kept about in the middle of the Pollock Rip slue channel.

The captain was all this time in the pilot house and suddenly, at about 8:38, the captain saw the shadow of a vessel's mast and smokestacks dead ahead, and he immediately stopped and reversed the engines' full speed, and had the helm put hard a port. The engines were immediately stopped and reversed at full speed, and the Dimock's headway was diminished, and her course was changed.

Notwithstanding all these precautions a collision was unavoidable, and at about 8:40 o'clock the bow of the Dimock struck the steamship

7 which had been previously sighted, the Alva, a few feet ahead of the foremast, and cut her down below the water line, so that she sank in about twenty-five minutes.

The Dimock got her boats ready and lowered her ladders and took all of the passengers, officers, and crew of the Alva aboard.

3rd. That at the time of the collision the Alva was lying anchored across the slue channel, so called, and directly in the course of the Dimock and all other vessels, which were on their way from Pollock Rip to the bell buoy. This is the regular inside slue channel usually taken by all coastwise steamers.

The channel at the point where the Alva was anchored is very narrow, and the Alva is about two hundred and ninety feet long, and lying as she was crosswise about in the middle of the channel, she practically obstructed it, and was directly in the course of the Dimock and of all steamers passing through.

This is a much frequented channel and is a very dangerous place for any vessel to anchor, as she is directly in the way of all vessels passing through, and no prudent man would anchor a steamship there as there is plenty of good safe anchorage near, and easily accessible out of the track of other vessels, which any competent pilot would avail himself of if he desired to anchor.

Being anchored in such an improper and dangerous position the Alva did not take sufficient and suitable precaution to make her position known until too late, and until a collision was unavoidable.

Your petitioner is informed and believes that at the time of the collision there was no proper competent Vineyard Sound licensed pilot in charge of the Alva, and there was no person in charge of the said Alva who was sufficiently familiar with that locality to either prudently navigate
8 or anchor said steamship under such circumstances as then existed.

4th. That independently of the limitation of liability hereinafter claimed, your petitioner denies and contests its liability, and the liability of the said Dimock for any loss, damage, or injury suffered by the Alva, or her owner, or any of the persons on board of her, or elsewhere, and it denies that the accident was occasioned by any want of care of the Dimock or those in charge of her, but it distinctly asserts and claims that she was at the time being navigated with the utmost prudence, and that every precaution was being used to avoid other vessels, and extraordinary care was being taken. Your petitioner further claims that the collision and the damage occasioned thereby was caused by the gross carelessness and incompetence of the person and persons in charge of the Alva at the time and by their gross carelessness in anchoring as aforesaid, and by their disregard of the ordinary, proper, and legal precautions.

5th. That if said collision and the damages occasioned thereby were caused by any act or neglect of the Dimock or those in charge of her, which your petitioner denies and claims the right of contesting in this proceeding, the same was occasioned or incurred without the privity or knowledge of your petitioner or any of its officers.

6th. That your petitioner is ignorant of the value of the Alva and of the amount of damage caused by said collision, but it is informed and believes that the Alva alone is claimed to be worth over two hundred and fifty thousand dollars, which is greatly in excess of the value of the steamship Dimock and her freight then pending.

Your petitioner alleges that the value of the Dimock at said time, together with her freight then pending, was less than one hundred and fifty thousand dollars.

9 7th. That your petitioner fears that suits or libels may be brought against it or against the Dimock and damages claimed largely in excess of the value of said vessel and her freight then pending.

That not admitting, but denying, any liability of itself, or of said steamship, for any act, matter, or thing, loss, damage, or injury done, occasioned, or incurred, your petitioner claims the benefit of the limitation of liability provided for in sections 4283 and 4284, chapter 6, title 48, of the Revised Statutes of the United States; and it hereby claims that, if this honorable court shall decide that any damage was done or occasioned by the negligence of the Dimock or those in charge of her, and for which said vessel is liable, that the liability of your petitioner as owner of said steamship shall be limited to the value of said steamship and her freight pending at said time.

Wherefore your petitioner prays:

1. That this honorable court will cause due appraisement to be had of the value of the steamship H. F. Dimock on or about the twenty-fourth

day of July, A. D. 1892, and of her freight then pending, and will make an order for a giving of a stipulation, with sureties for the payment thereof into court whenever the same shall be ordered.

2. That the court will issue a monition against all persons claiming damages for loss, destruction, damage, and injury occasioned by aforesaid collision, citing them to appear before this court and make due proof of their respective claims before a certain day to be named in said monition.

3. That the court will also designate a commissioner before whom such claims shall be presented in pursuance of said monition, and to make report thereof to the court; and that the petitioner may be at liberty to contest its liability and the liability of the said Dimock for all such loss, damage, or injury independently of the limitation of liability herein claimed.

4. That the court will make an order restraining all persons from prosecuting suits and libels against your petitioner, and against said steamship, except before said commissioner, and in this proceeding; and that, upon the coming in of the report of said commissioner and confirmation thereof, it shall appear that your petitioner is not liable and said steamship is not liable for such loss, damage, destruction, or injury that it may be so finally decreed by this court.

5. That if the court shall find and decree that any person or persons are entitled to maintain claims against your petitioner, or against the said steamship, for or on account of any act, matter, or thing, loss, damage, or injury done, occasioned or incurred, then that the court will order and decree that the liability of your petitioner shall in no event exceed the value of said steamship and her freight pending at said time, and that your petitioner and said steamship shall be forever exempt from all further liabilities in the premises; and that the monies secured to be paid into court as aforesaid, after the payment of costs and expenses, shall and may be divided pro rata amongst the several claimants in proportion to the amount of their respective claims; and that in the meantime, and until the final judgment of the court shall be rendered herein, this court will make an order restraining the further prosecution of all and any suits or suit against your petitioner in respect of any such claim or claims, or against said steamship Dimock.

6. That this honorable court will order, do, and decree all other matters and things needful and customary for the determination of the rights of the parties and for the limitation of the liability of your petitioner, as aforesaid, and that the petitioner may have all such other and further orders, decrees, and reliefs as justice may require.

METROPOLITAN STEAMSHIP COMPANY,
By H. M. WHITNEY, *President.*

JOHN LOWELL,
JOHN LOWELL, Jr.,
WM. D. SOHIER,
Proctors for Libellant and Petitioner.

COMMONWEALTH OF MASSACHUSETTS,
Suffolk, ss:

Then personally appeared Henry M. Whitney, president of the Metropolitan Steamship Company, and makes oath that the allegations of the

foregoing libel and petition by him subscribed on behalf of said corporation are true, according to the best of his knowledge, information and belief.

Witness my hand and notarial seal this —— day of August, A. D. 1892.

[L. S.] JOHN BRADFORD,
Notary Public.

12 (Indorsed:) 382. The Metropolitan Steamship Co. Petitioner to limit liability of S. S. "H. F. Dimock." Warrant to appraise issued. United States district court. Mass. dist. Filed in clerk's office Aug. 16, 1892.

13 UNITED STATES OF AMERICA,
Massachusetts district, ss:

[SEAL.]

The President of the United States of America, to the marshal of Massachusetts district or his deputy, greeting:

Whereas a libel or petition has been filed before the honorable the judge of the district court for the district aforesaid by the Metropolitan Steamship Company, a corporation duly organized under the laws of the Commonwealth of Massachusetts and having its principal place of business in Boston, in said Commonwealth, owner of the steamship H. F. Dimock, against William K. Vanderbilt, of the city, county, and State of New York, owner of the steamship Alva, and all other persons now or hereafter claiming damages against said petitioner as owner of said steamship H. F. Dimock or against said steamship by reason of any of the losses or matters in said libel or petition set forth, claiming the benefit of limitation of liability as owner of said steamship H. F. Dimock, according to the provisions of the statutes of the United States; and whereas said libellant or petitioner, owner of said steamship H. F. Dimock, has prayed that said steamship H. F. Dimock and appurtenances and pending freight might be appraised and the value thereof at the time of the damage as set forth in said libel, and has also prayed that it might be allowed to stipulate for the payment into court of such appraised value as the law directs in such cases: you are therefore directed to cause said steamship and pending freight to be appraised on oath by R. G. F. Candage, Andrew G. Whidden, and Robert B. Gardner, said appraisement to be made as soon as may be, and the appraisers to be duly sworn.

Witness, the honorable Thomas L. Nelson, at Boston, this sixteenth day of August, A. D. 1892.

FRANK H. MASON, *Clerk.*

14 UNITED STATES OF AMERICA,
Massachusetts District, ss:

BOSTON, *Aug.* 1892.

Personally appeared the within-named R. G. F. Candage, Robert B. Gardner and Andrew C. Whidden, and severally made oath that they will appraise the within-named steamship et al., and pending freight, according to their best skill and judgment.

Before,

[SEAL.] FRANK H. MASON,
Clerk U. S. Dist. Court, District of Mass.

UNITED STATES OF AMERICA,
Massachusetts District, ss:

Pursuant to the annexed warrant, I have notified the appraisers therein named of their appointment, and have requested of them to attend to the duties assigned them, and they have attended and make report as under.

F. X. MACDONALD,
Deputy Marshal.

Boston, August 17, 1892.

Fees:

Service of notice	6.00
Off. attendance	5.00
Travel	.48
Travel. & clerk	3.00
Pd. 3 appraisers	45.00
Expense	4.12
	$63.60

15 We, the subscribers, having been notified by the marshal of the district of Massachusetts, that we were appointed by the honorable Thomas L. Nelson, judge of the district court for the district of Massachusetts, to estimate and appraise the steamship H. F. Dimock, mentioned in the annexed warrant, have attended to the duties assigned us, and after a strict examination and careful inquiry we do estimate and appraise the said steamship as under: at eighty thousand dollars ($80,000), and the freight pending at the time of the within-named collision at twenty-three hundred ninety-five and $\frac{33}{100}$ dollars ($2,395.33).

Steamship	$80,000.00
Freight	2,395.33
Total	$82,395.33

In witness whereof we hereunto set our hands, at Boston, this seventeenth day of August, A. D. 1892.

R. G. F. CANDAGE,
R. B. GARDNER,
ANDREW G. WHIDDEN.

16 (Indorsed:) The Metropolitan S. S. Co., petitioner. Warrant to appraise S. S. H. F. Dimock. United States marshal's office, room 101, P. O. building, Boston, Mass., Aug. 17, 1892.

17 District court of the United States, district of Massachusetts.

In admiralty—No. 382.

The Metropolitan Steamship Company, petition to limit liability of S. S. "H. F. Dimock."

Order of court.

Whereas in the above-entitled cause it appears to the court that due appraisement has been had of the amount or value of the interest of the libellant or petitioner in the steamship H. F. Dimock and pending freight, at the time alleged in said petition; and the value of its interest in said

steamship and pending freight is found to be as follows, viz: Value of steamship, eighty thousand dollars; pending freight, two thousand three hundred ninety-five and $\frac{33}{100}$ dollars.

Now, therefore, it is ordered and decreed that the libellant or petitioner give proper stipulation, with sureties, for the payment of said sums into court whenever the same shall be ordered.

By the court:

FRANK H. MASON,
Clerk.

18 (Indorsed:) 382. The Metropolitan S. S. Co., pet'r to limit liability of S. S. "H. F. Dimock." Order for stipulation. United States district court. Mass. dist. Filed in clerk's office, Aug. 17, 1892.

19 I, Henry M. Whitney, of Brookline, in the State of Massachusetts, on oath depose and say that I own unincumbered real estate in Boston, in said State, worth one hundred thousand dollars, and that I have personal property worth one hundred thousand dollars, and that I am worth at least two hundred thousand dollars above all my debts and liabilities.

HENRY M. WHITNEY.

COMMONWEALTH OF MASSACHUSETTS,
Suffolk County, ss:

BOSTON, *Aug.* 17, 1892.

Subscribed and sworn to before me.
[L. S.] FRANK H. MASON,
Notary Public.

I, Henry F. Dimock, of New York, in the State of New York, on oath depose and say that I own incumbered real estate in said New York and in the State of Connecticut worth twenty-five thousand dollars above the incumberances, and that I have personal property worth one hundred seventy-five thousand dollars, and that I am worth at least two hundred thousand dollars above all my debts and liabilities.

HENRY F. DIMOCK.

COMMONWEALTH OF MASSACHUSETTS,
Suffolk County, ss:

BOSTON, *Aug.* 17, 1892.

Subscribed and sworn to before me.
[L. S.] FRANK H. MASON,
Notary Public.

20 *Instance.—Stipulation to the action.*

At a district court of the United States of America, holden at Boston, within and for the district of Massachusetts, on the seventeenth day of August, in the year of our Lord one thousand eight hundred and ninety-two.

In cause the Metropolitan Steamship Company, petitioner to limit liability as owner of steamship "H. F. Dimock." Then appeared the

Metropolitan Steamship Company (a corporation duly organized under the laws of the Commonwealth of Massachusetts, and having its usual place of business in Boston, in said Commonwealth), by its president, Henry [of] M. Whitney, and produced for sureties Henry M. Whitney, of Brookline, in said district, and Henry F. Dimock, of New York, in the district of New York.

And the said, The Metropolitan Steamship Company, Whitney and Dimock, submitting themselves to the jurisdiction of this court, bound themselves, their heirs, executors and administrators, jointly and severally, in the sum of eighty-two thousand three hundred ninety-five & $\frac{33}{100}$ dollars, unto William K. Vanderbilt, of the city, county, and State of New York (owner of the steamship "Alva"), and all other parties claiming damages in these proceedings, that the said libellant or petitioner shall abide by all orders and decrees, interlocutory or final, of the court, and shall pay the amount of the final decree of the court, and all sums of money that it shall be ordered to pay by the final decree of the court, whether it be in this or any appellate court, and unless it shall so do, they do hereby consent that forthwith execution shall issue forth against them, their heirs, executors, and administrators, jointly and severally, and against their lands, goods, and chattels, wheresoever the same shall be found to the value of the sum above mentioned, without further notice or delay.

THE METROPOLITAN STEAMSHIP COMPANY,
By HENRY M. WHITNEY,
President.

HENRY M. WHITNEY.
HENRY F. DIMOCK.

Attest:

FRANK H. MASON,
Clerk.

21 (Indorsed:) 382. The Metropolitan S. S. Co., pet'r to limit liability as owner of S. S. H. F. Dimock. Stipulation to the action and justification of sureties.

22 MASSACHUSETTS DISTRICT, *ss:*
[SEAL.]

The President of the United States of America to the marshal of our said district or either of his deputies, greeting:

We command you that you give notice to William K. Vanderbilt, of the city, county, and State of New York (owner of the steamship "Alva"), and to all persons concerned, that a libel or petition is filed before the honorable Thomas L. Nelson, judge of the district court for said district, by the Metropolitan Steamship Company as owner of the steamship "H. F. Dimock" at the time of the loss and damage hereinafter stated, and of her freight then pending, against said William K. Vanderbilt, and against any and all other persons now or hereafter making or alleging any claim against the said steamship, or the libellant as owner thereof, by reason of the loss or damage, acts, and matters hereinafter referred to, in a cause of damage and limitation of liability, civil and maritime, wherein and whereby the said owner of said steamship claims the benefit of limitation of liability, as by law provided and set forth in said libel and petition;

the damages alleged in the premises having occurred, as it is alleged, by reason of a collision between the said steamship "H. F. Dimock" and the steamship "Alva," in Vineyard Sound, on the morning of July 24, 1892, whereby the said steamship "Alva" was sunk.

And that you cite the said William K. Vanderbilt and any and all persons claiming damages for any loss of property or personal injuries occasioned or incurred by reason of, or caused by or arising out of the said collision, to appear before this honorable court at the United States
23 court-house in Boston in said district of Massachusetts, on or before Friday the 25th day of November next, at 10 o'clock in the forenoon, and make due proof of their respective claims in the premises; and that you give notice by serving an attested copy hereof on said William K. Vanderbilt, if he may be found within said district, and that you give further notice by advertising the same in the Boston Daily Advertiser, a newspaper published at said Boston, at least sixty days before the return day named herein; and that you also post a copy of the same notice at the said court-house in said Boston.

Witness the honorable Thomas L. Nelson, esquire, at said Boston this seventeenth day of August, A. D. 1892.

FRANK H. MASON,
Clerk.

24 UNITED STATES OF AMERICA,
Massachusetts District, ss:

BOSTON, *September* 2, 1892.

I hereby certify that I have given notice of the within monition to the within named Vanderbilt and all other persons concerned by advertising this monition in the Boston Daily Advertiser, a newspaper published at said Boston, on the 19th and 26th day' of August and on the 2nd day of September. I also, on the 19th day of August, posted a copy of this monition in the court-house at said Boston. I also, on the same day of August, gave a further notice to the said Vanderbilt by mailing to him an attested copy of this monition by registered letter to his house at Newport.

F. X. MACDONALD,
Deputy U. S. Marshal.

Fees:

Service	4.00	$23.70
Copies	3.00	
Adv. & posting	16.00	
Travel & exp	.25	

25 (Indorsed:) 1621. 382. The Metropolitan S. S. Co. Pet'r to limit liability as owner of S. S. H. F. Dimock. Monition. United States marshal's office, Boston, Mass., Aug. 17, 1892. P. O. building.

26 District court of the United States, district of Massachusetts.

In admiralty.

In the matter of the libel or petition of the Metropolitan Steamship Company, owner of the steamship H. F. Dimock, for limitation of liability, against William K. Vanderbilt.

Order. August 17, 1892.

Whereas in the above-entitled cause it appears to the court that due appraisement has been had of the amount or value of the interest of the libellant, as owner of said steamship H. F. Dimock, in such steamship and her freight pending for the voyage, and that due stipulation has been given with sureties for the payment thereof into court whenever the same shall be ordered, and that monition has been issued against all persons claiming damages for any loss, damage, or injury arising out of the matters and acts alleged in the libel;

And whereas the libel filed by the said Metropolitan Steamship Company for limitation of liability seeks to limit its liability for all losses by reason of damage caused by collision, as set forth in said libel, and has applied to the court for an order restraining all persons from prosecuting suits and libels against said libellant or petitioner, and against said steamship H. F. Dimock, arising out of the losses occasioned by collision, as set forth in said libel:

It is thereupon ordered and decreed that the said William K. Vanderbilt and all persons claiming damages for any loss, damage, or injury
27 arising out of the matters and acts alleged in said libel, be, and they are hereby, enjoined from prosecution of all and any suit or suits against the libellant or petitioner as owner of said steamship H. F. Dimock, or against said steamship, in respect of any claim or claims arising out of the collision aforesaid, except in these proceedings.

Attest:

[SEAL.] FRANK H. MASON,
Clerk.

UNITED STATES OF AMERICA,
Massachusetts District, ss:

BOSTON, *August* 20, 1892.

I hereby certify that I have this day mailed an attested copy of the within restraining order to Roote & Clarke, attorneys for the within-named W. K. Vanderbilt, at New York.

F. X. MACDONALD,
Deputy U. S. Marshal.

Fees:
Service..... 2.00 } $3.00
Copy..... 1.00 }

28 (Indorsed:) 1622. 382. The Metropolitan S. S. Co., pet'r, to limit liability as owner of S. S. "H. F. Dimock." Restraining order. United States marshal's office, P. O. building, Boston, Mass., Aug. 17, 1892.

29 United States district court, district of Massachusetts.

THE METROPOLITAN STEAMSHIP COMPANY (steamship H. F. Dimock) *vs.* WILLIAM K. VANDERBILT. } In admiralty.

To the honorable the judge of the district court within and for the district of Massachusetts:

Your petitioner in the above-entitled cause respectfully moves to amend its petition and libel by adding at the end of the sixth clause thereof the following words:

"Your petitioner alleges that at the time the libel and petition was filed in this cause the said steamship H. F. Dimock was and has ever since been lying in the port of Boston and within the admiralty jurisdiction and process of this honorable court."

METROPOLITAN STEAMSHIP COMPANY,
By HENRY M. WHITNEY, *President.*

JOHN LOWELL,
JOHN LOWELL, Jr.,
WM. D. SOHIER,
Proctors for Petitioner.

COMMONWEALTH OF MASSACHUSETTS,
Suffolk, ss:

Then personally appeared Henry M. Whitney, president of the Metropolitan Steamship Company, and makes oath that the allegations in the foregoing amendment are true.

Witness my hand and seal this 25th day of August, A. D. 1892.

[L. S.] OSCAR G. BERRY,
Notary Public.

30 (Indorsed:) 382. The Metropolitan S. S. Co., pet'n to limit liability. Amendment to libel. United States district court. Mass. dist. Filed in clerk's office, Aug. 27, 1892.

31 I, Frank H. Mason, clerk of the United States district court for the district of Massachusetts, hereby certify that the foregoing are true copies of the libel or petition, warrant to appraise, order for stipulation, stipulation to the action, monition, restraining order, and amendment to libel, and all the indorsements thereon, in the cause of the Metropolitan Steamship Company, petitioner to limit liability as owner of the steamship H. F. Dimock, being all the papers of record in said cause.

In witness whereof I have hereunto set my hand and affixed the seal of said court this 7th day of November, A. D. 1892.

[SEAL.] FRANK H. MASON,
Clerk.

29 United States district court, district of Massachusetts.

THE METROPOLITAN STEAMSHIP COMPANY (steamship H. F. Dimock) *vs.* WILLIAM K. VANDERBILT. } In admiralty.

To the honorable the judge of the district court within and for the district of Massachusetts:

Your petitioner in the above-entitled cause respectfully moves to amend its petition and libel by adding at the end of the sixth clause thereof the following words:

"Your petitioner alleges that at the time the libel and petition was filed in this cause the said steamship H. F. Dimock was and has ever since been lying in the port of Boston and within the admiralty jurisdiction and process of this honorable court."

METROPOLITAN STEAMSHIP COMPANY,
By HENRY M. WHITNEY, *President.*

JOHN LOWELL,
JOHN LOWELL, JR.,
WM. D. SOHIER,
Proctors for Petitioner.

COMMONWEALTH OF MASSACHUSETTS,
Suffolk, ss:

Then personally appeared Henry M. Whitney, president of the Metropolitan Steamship Company, and makes oath that the allegations in the foregoing amendment are true.

Witness my hand and seal this 25th day of August, A. D. 1892.

[L. S.] OSCAR G. BERRY,
Notary Public.

30 (Indorsed:) 382. The Metropolitan S. S. Co., pet'n to limit liability. Amendment to libel. United States district court. Mass. dist. Filed in clerk's office, Aug. 27, 1892.

31 I, Frank H. Mason, clerk of the United States district court for the district of Massachusetts, hereby certify that the foregoing are true copies of the libel or petition, warrant to appraise, order for stipulation, stipulation to the action, monition, restraining order, and amendment to libel, and all the indorsements thereon, in the cause of the Metropolitan Steamship Company, petitioner to limit liability as owner of the steamship H. F. Dimock, being all the papers of record in said cause.

In witness whereof I have hereunto set my hand and affixed the seal of said court this 7th day of November, A. D. 1892.

[SEAL.] FRANK H. MASON,
Clerk.

147 U.S. 14

Office Supreme Court U. S.
FILED.
DEC 7 1892
JAMES H. McKENNEY,
Clerk.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1892.

Original Docket No. 9.

HENRY MORRISON

vs.

THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MASSACHUSETTS, and the HONORABLE THOMAS L. NELSON, Judge of said Court.

PROHIBITION.

BRIEF OF PETITIONER.

ELIHU ROOT,
HARRINGTON PUTNAM,
SAMUEL B. CLARKE,
Of Counsel.

C. G. BURGOYNE, Cor. Centre and Walker Sts., New York.

Supreme Court of the United States,

OCTOBER TERM, 1892.

ORIGINAL DOCKET No. 9.

HENRY MORRISON AGAINST THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MASSACHUSETTS, and the HONORABLE THOMAS L. NELSON, Judge of said Court.	Petition for Prohibition.

BRIEF FOR PETITIONER.

(The record in this case, so far as the proceedings in the Massachusetts Court are concerned, is substantially the same as in the mandamus case. We, therefore, beg leave to refer the Court to our brief in that case for a statement of the facts and for a discussion of the questions involved in both cases. We shall now confine ourselves to the matters which are pertinent to this case alone.)

The Return of Judge NELSON sets out an attested copy of the proceedings in his Court, and states that they were duly taken according to the usual course and practice of said Court in such cases.

The attested copy of the proceedings appears to differ from the copy filed in the New York Court in the following particulars only:

A. In setting out the formal justification of the sureties on the stipulation (Return, p. 8).

B. In setting out the Marshal's return to the monition; certifying that he had given notice of the monition to Vanderbilt, and all other persons concerned, by advertisement in a newspaper, by posting a copy in the Court House, and by mailing an attested copy to Vanderbilt at his house in Newport (Return, p. 10).

C. In omitting the certificate and affidavit of the Rhode Island Deputy Sheriff that he personally served "the original writ" (injunction decree) on Vanderbilt, at Newport, September 16th, 1892 (Petition, p. 50).

The return says nothing about the allegations in the petition regarding the proceedings in the New York Court. As authentic proof of those proceedings we offer in evidence in this case Judge BROWN'S return to the rule in the mandamus case. We also offer in evidence an exemplified copy of Morrison's libel, the process, the Marshal's return and Vanderbilt's appearance, also a certificate by the Clerk of the District Court for the Southern District of New York as to security for costs being given by Morrison and Vanderbilt; such exemplified copy and the certificate being deposited with the Clerk of this Court to abide the ruling on our offer. Notice that the offer would be made was given in the petition (pp. VIII. and IX.).

The ultimate question in this case is different from that in the mandamus case. There the question was as to the legal effect of the Massachusetts proceedings, as they stand, upon Morrison's rights. Here the question is whether the Massachusetts Court has power to

proceed further either generally or upon the footing of particular proceedings already taken.

FIRST POINT.

The power vested in this Court by the Judiciary Act of 1789 (re-enacted R. S., Sec. 688) to issue writs of prohibition to the District Courts, when proceeding as courts of admiralty, is broad enough to authorize a special as well as a general prohibition; and it includes power to base the prohibition on authentic evidence of facts dehors the record of the District Court showing that further proceeding by that Court would be unauthorized.

I.

Comyn Dig., Tit. Prohibition (F. 17): "If a suit be in the spiritual court for a matter within their conusance mixed with matter of which the Court has no jurisdiction, a prohibition shall go *quoad* the part of which it has no jurisdiction. As if in a suit for tithes the sentence be for the treble value, there shall be a prohibition *quoad* the treble value. So if a suit be against a bishop for granting institution and induction, after a *duplex querela* against him, there shall be a prohibition *quoad* the repeal of the institution, not *quoad* the contempt."

Com. Dig., Tit. Prohibition (D.): "Before sentence prohibition issues on a suggestion of matter of fact not appearing on the face of the proceedings below."

Idem Tit. Admiralty (F. 9): "But where the party

has allowed the jurisdiction of the Admiralty, he cannot have a prohibition upon a suggestion, unless it appears upon the libel to be out of their jurisdiction."

Idem Tit. Admiralty (*F.* 7): "So if the libel be for flotsam, when it was wreck, if that be suggested, a prohibition goes."

Idem Prohibition (*F.* 9): "Any one cited out of his diocese may have a prohibition before appearance to the suit."

Idem Prohibition (*F.* 15): "A prohibition for refusing a copy ought not to be granted till an affidavit of the refusal."

Anonymous, 2 Salk 553; prohibition for refusing copy granted, *quousque* copy furnished.
See also, Fitzherbert, *Natura Brevium*, Prohibition and Inhibition, *passim*.
Vaughan vs. Evans, 8 Mod. [374].
Johnson vs. Lee, 5 Mod. [238].
Robinson vs. Godsalve, 1 Ld. Raym., 123.
Doctor James's Case, Hobart, 17.
Rowland vs. Hockensulle, 1 Ld. Raym., 698.
Mendyke vs. Stint, 2 Mod. [272].

These resolutions of the English Courts must have been familiar to the framers of the Judiciary Act; and inasmuch as they conferred the power of prohibition upon this Court broadly without specification or limitation of the grounds for exercising it or as to the modes of arriving at the grounds for such exercise, and with no limitation except as to the Courts to which the writ may be directed, we think it is fairly to be understood that they intended that in a proper case the power may be exercised on matter *dehors* the record of the lower Court; that it may be exercised *quoad* particular matters as well as generally; and that it may be used for any jurisdictional defect whatever, whether as to subject matter or as to parties (including things as well as persons), or in respect to the inherent limitations upon modes of procedure expounded by this Court in Windsor vs. McVeigh, 93 U. S., 274, 282.

II.

We do not understand that the remarks of this Court in several cases (*e. g. Ex parte* Christy, 3 How., 292; *Ex parte* Easton, 95 U. S., 68), to the effect that a prohibition will not be based on facts *dehors* the record of the lower Court are universally applicable; nor that those other remarks (*e. g., Ex parte* Christy *supra*, and *in re Fassett*, 142 U. S., 479), to the effect that for this Court to decide certain questions on an application for prohibition would be to exercise original jurisdiction on matters *subs judice* in a lower Court were intended to intimate that this Court cannot grant a prohibition on grounds which have not been presented to the judgment of the lower Court. *We know of no decision by this Court that where the application for prohibition is made by a person of whom the Lower Court has not obtained personal jurisdiction, who has not appeared there nor raised any issue there, and one of the grounds for whose application is that unauthorized proceedings are being used in order to force him to appear personally*, a prohibition cannot be granted on extrinsic matters. And we suppose the constitutional appellate power of this Court is not limited merely to a review of questions which have already been decided by some lower Court, but that any power of supervision over other courts which is vested in this Court by Act of Congress may be part of its appellate jurisdiction (Marbury vs. Madison, 1 Cranch, at p. 175–6; Exp. Bradley, 7 Wall., 364; The St. Lawrence, 1 Black, 522, 528; Ward vs. Chamberlain, 2 Black, 430, 436).

In *United States vs. Peters*, 3 Dallas, 121, this Court did receive evidence *dehors* the record and based the writ, which was issued to Judge PETERS, thereon. It did not appear in that case on the face of the libel that the "Cassius" was authorized by France to make captures at sea, but that fact was averred in the suggestion in this Court, and proved by the exhibition here of

the commander's commission and by the certificate of the French Minister. The writ, as printed in the report, does not recite that the authority of the "Cassius" appeared on the face of Yard's libel; but before Yard's libel is mentioned at all the writ recites the fact of authority as "shewn" to this Court, and there is a further recital as follows: "*As by his commission and the certificate of the Minister Plenipotentiary of the said Republic to the United States, to the Court shewn, more fully appears.*"

See also

Mayor, etc., of London vs. Cox, L. R., 2 H. L., 239.
Sergeant vs. Dale, L. R., 2 Q. B. D., 558.
James vs. London & S. W. Ry. L. R., 7 Ex., 187.

SECOND POINT.

Further proceedings should be prohibited generally because the steamship company has not submitted itself to the jurisdiction of the Court sufficiently to authorize the Court to render an effective judgment as to that company, if it should decide, after hearing, that the value of vessel and freight exceeded the amount of the stipulation.

See

Mandamus, Brief, p. 20-22.
Norwich Co. vs. Wright, 13 Wall., 104 (Decision as to jurisdiction of Connecticut Court).

THIRD POINT.

Further proceedings should be prohibited generally, because (the New York Court having on Morrison's libel attached the "Dimock," and its process having been personally served within the district on the steamship company, and Vanderbilt, the only person, besides Morrison, known to be a damage claimant, having voluntarily appeared, and the Massachusetts Court not having acquired personal jurisdiction of any damage claimant, nor jurisdiction in rem of any property in which damage claimants have or claim an interest) the New York Court has exclusive jurisdiction of the cause.

In Prov. & N. Y. S. S. Co. vs. Hill Mfg. Co., 109 U. S., at page 595, it is said: "The questions to be settled by the statutory proceedings being, first, whether the ship or its owners are liable at all (if that point is contested and has not been decided); and, secondly, if liable, whether the owners are entitled to a limitation of liability, must necessarily be decided by the District Court having jurisdiction of the case; *and to render its decision conclusive it must have entire control of the subject to the exclusion of other Courts and jurisdictions.* If another Court may investigate the same questions at the same time, it may come to a conclusion contrary to that of the District Court; and, if it does (as happened in this case), the proceedings in the District Court will be thwarted and rendered ineffective to secure to the shipowners the benefit of the statute."

FOURTH POINT.

Proceedings should be prohibited generally because the "Dimock" (having been taken out of the Massachusets District without being discharged from the collision claims, and having been attached by the New York Court) is not in the Massachusetts District nor subject to the control of the Court there within the meaning of Admiralty Rule 57.

If we are right in the mandamus case, the release of the ship by the New York Court was improvidently made, and she must be regarded as in legal contemplation still in the custody of that Court.

The Rio Grande, 23 Wall., 458.

FIFTH POINT.

Proceedings upon the appraisement, stipulation, injunction decree and monition should be prohibited because the appraisement was not a due appraisement within the meaning of Admiralty Rule 54.

SIXTH POINT.

Proceedings upon the injunction decree should be prohibited because it is an absolute injunction made without notice, and an opportunity to be heard being given to the persons whose rights purport to be affected thereby.

See Mandamus, Brief, pp. 9-22,

And see James vs. L. & S. W. Ry. Co., L. R., 7 Ex., 187, 287, where a similar injunction was issued without notice and a prohibition was granted, most of the Judges, it is true, going on another ground, but one of them (MARTIN, B.) resting his judgment on this additional ground, viz. (p. 200):

> "I must add that quite apart from these statutes I think the prohibition should go because the plaintiff had no notice whatever given to him of any of these proceedings affecting him which were being taken in the Court of Admiralty. It is an essential principle of justice that, if a Court proposes to make an order affecting a man's rights, he is entitled to be heard against that order before it is made. That is the effect of the cases cited in Broom's Legal Maxims, 5th Ed., p. 113, and upon that ground alone I should be prepared to hold these proceedings in the Admiralty Court defective. The order of the 4th of June, 1870, appears to me to be a mere nullity, and we are bound to protect the plaintiff from its consequences."

Vaughan vs. Evans, 8 Mod., 374:

> "Prohibition to the Court of Grand Sessions in Wales. The case was thus; Evans had a mort-

" gage of lands within the jurisdiction of that " Court, which lands were afterwards purchased by " Vaughan, as he pretended, and he got into posses- " sion by undue means. Then Evans, the mortgagee, " filed a bill against him in that Court, and against " another who lived within the jurisdiction, but " Vaughan lived in London, and was served with " a subpœna there; and, not appearing upon the " service of the subpœna, the plaintiff Evans pro- " cured a sequestration of this land which lay " within the jurisdiction of that Court, and then, " and not till then, Vaughan moved for a prohibi- " tion.

" It was now argued that a prohibition ought not " to go, because it was absolutely necessary to make " Vaughan a defendant jointly with the other " who lived within the jurisdiction. Besides, the " Court of Grand Sessions is a Court of original " jurisdiction, though circumscribed as to place; " and, this being a personal process, may be as " well served in London as the process of the " Court of Chancery may be served in Paris or in " Dublin or elsewhere out of this realm, or the " process of the Court of Chancery may be served " here, which is done every day. It is true, that " Court cannot issue an attachment or any other " process for a contempt out of their jurisdiction, " which may be a reason for sequestering the " lands within their jurisdiction, until the party " shall obey their process. * * *

" The Court: The Court of General Sessions " have no jurisdiction in this case; for sequestra- " tion cannot issue but after a personal notice; " and no personal notice can be given to the de- " fendant who lives in London, because their " process can only be served in their own district. " * * * Let there be a prohibition."

SEVENTH POINT.

If the foregoing propositions are sound, Morrison ought not to be required to submit them formally to the judgment of the Massachusetts Court.

He cannot do so except by submitting himself personally to the jurisdiction of that Court. He ought not to be forced by unauthorized proceedings to make a personal appearance.

EIGHTH POINT.

The prayers of the petitioner should be granted.

ELIHU ROOT,
HARRINGTON PUTNAM,
SAMUEL B. CLARKE,
Of Counsel.

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147 U.S. 14.

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1892.

ORIGINAL DOCKET No. 9.

EX PARTE: MORRISON, PETITIONER FOR PROHIBITION.

BRIEF IN OPPOSITION TO PETITION.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1892. ORIGINAL DOCKET NUMBER 9.

EX PARTE: MORRISON, PETITIONER FOR PROHIBITION.

Brief in Opposition to Petition.

On the 24th of July, 1892, the steamship H. F. Dimock owned by the Metropolitan Steamship Company, of Boston, Massachusetts, came into collision with and sank, under circumstances not concerning this cause, the steam yacht, Alva, owned by Mr. Vanderbilt.

More than three weeks afterwards, no action having been brought by any one for damages caused by the collision, the Metropolitan Steamship Company brought a libel or petition in the District Court of Massachusetts, to limit its liability; an appraisement of the ship and freight was ordered and made in strict accordance with the rules of this court and the practice of the District Court of Massachusetts, and a stipulation was given in the amount so ascertained.

Mr. Vanderbilt was not satisfied with the amount of the stipulation, and he and his captain wish to transfer the proceedings to the Southern District of New York, where a different value, as he hopes, may be given to the steamship Dimock.

To attain this end, they are obliged to dispute the jurisdiction of the Massachusetts Court.

That the bond is too small by reason of an inadequate valuation, though important if true, is not reason for a prohibition.

1. It will, of course, not be disputed that the only question here is that of jurisdiction in the District Court of Massachusetts.

Ex Parte Gordon, 104 U. S. 515.
Ex Parte Ferry Co., 104 U. S. 519.
Ex Parte Slayton, 105 U. S. 451.
Smith *v.* Whitney, 116 U. S. 167.
In Re Garnett, 141 U. S. 1.
In Re Cooper, 143 U. S. 473, 495.

2. Nor will it be denied that courts of admiralty in this country are Superior Courts, in the sense that all presumptions are in favor of their jurisdiction.

New Lamp Chimney Co. *v.* Ansonia Brass and Copper Co., 91 U. S. 656.
Jennings *v.* Carson, 4 Cranch 2.
Brown *v.* Bridge, 106 Mass. 563.

3. It is admitted by the petitioner that the District Court for Massachusetts was a proper court in which to bring our proceedings for limited liability, and that they were rightly begun.

See Adm'y Rule 57, 130 U. S. 705.

4. But the petitioner contends that to retain jurisdiction the Court should have kept possession of the ship, until he or Mr. Vanderbilt, or both, chose to appear in the cause; and that by sending her to New York in the ordinary course of her business between Boston and New York, after a bond had been given *ex parte*, the steamship company waived and the District Court lost such jurisdiction as had been acquired, which they say was only inchoate, or, as he expresses it, "full jurisdiction" was not acquired.

To this there are several sufficient answers.

A. The proceedings to limit liability though an action *in rem* in a certain sense, are not an action against the ship and freight concerned, excepting when they are surrendered to a trustee.

B. The rules under which these proceedings were taken are constitutional.

C. When the proceedings are begun in an appropriate court the jurisdiction attaches, and is not lost by any irregularity of subsequent interlocutory procedure.

D. An *ex parte* valuation and bond are often necessary and proper and were so in this case.

E. If the appraisement was not duly made and the bond not duly taken, it was an irregularity which the District Court could and would correct; and if it refused, the refusal could be revised in the Appellate Court as it would not be purely discretionary.

F. If this were an action against the ship and freight the stipulation represents them.

A. The proceeding to limit liability is an equitable action, not *in rem* in the ordinary sense.

It may be brought in the District Court of a district in which an action in the State or Federal Courts is pending, though it be in an interior district, where no sea-coast or navigable river is found.

It may be brought though the ship has been totally destroyed and no freight has been earned.

In England the remedy was originally in equity, unless the Admiralty Court had possession of the ship or its proceeds; but in 1873, the judicature act gave equity powers to the Court of Admiralty, and since that time all these actions are brought in the Admiralty Division and *in personam.*

Williams & Bruce, Admiralty Practice, 84, as to jurisdiction. All the cases cited below, and all which we have seen are *in personam.*

This power was given in England two years after this court had made its rules by which our Admiralty Courts are governed in these proceedings *in personam.*

B. The petitioner contends that neither Congress nor this Court can lawfully authorize proceedings which will affect his rights, unless he is personally served with notice thereof within the territorial limits of the Court's jurisdiction, or a *res* is taken and held by the Court; that these two classes of cases contain the whole power of the United States Courts.

This enumeration is not exhaustive.

There are proceedings which necessarily involve the rights of citizens of different States, and which must be brought somewhere, and be binding throughout the country, though there be no possibility

of such personal service, and no such actual manual possession of a *res* as the plaintiff requires.

Proceedings in bankruptcy, to which these petitions to limit liability have been happily compared by Judge Benedict, are proceedings *in rem* (New Lamp Chimney Co. *v.* Ansonia Brass and Copper Co., 91 U. S. 656) in the sense that the creditors in all the States are bound by them, though they be brought in a district where no creditor lives. It is not necessary that there should be any assets, nor, if there are assets, that they should be actually surrendered to the Court or its officers. If the bankrupt, after filing his petition, should abscond with all his effects, the jurisdiction would not be lost.

Such a case as this is a case in bankruptcy, *quoad* the liability of the ship owner in respect to a particular subject. It is brought to discharge him from responsibility for damages in a case where they may be infinitely greater than the remaining assets, or where there may be no assets.

The bankrupt's or the shipowner's submission to the jurisdiction is the *res*.

The fundamental defect in the plaintiff's definition of constitutionally possible actions is, that it takes no account of proceedings *in rem* such as these. What he admits as actions *in rem* can only affect the *res*, and not a person out of the jurisdiction, excepting as to his interest in the *res*. Therefore, it would not help the case here if the Massachusetts Court had held and kept the ship, for still, under the plaintiff's contention, Mr. Vanderbilt if he didn't choose to appear would lose no rights against her owners who were entirely solvent.

It would therefore be impossible in most cases for any District Court to discharge the ship owner as to all damage claimants, who were out of the district and did not choose to come within it.

This is too late a day to set up this objection. The decisions of this Court have established the power of Congress to pass the law of limited liability, and of the admiralty courts to enforce it. Its enforcement is impossible under the restrictions which the plaintiffs would impose.

Norwich Co. *v.* Wright, 13 Wall. 104.
The Lottowana, 21 Wall. 558.

The Benefactor, 103 U. S. 239.
The Scotland, 105 U. S. 24.
S. C., 118 U. S. 507.
The City of Norwich, 118 U. S. 468.
Prov. & N. Y. S. S. Co. *v.* Hill Mfg. Co., 109 U. S. 578.
Butler *v.* Boston & S. S. S. Co., 130 U. S. 527.

C. As in bankruptcy, and in many cases in equity, a bill or petition filed, with an offer to comply with the orders of the Court in respect to the fund, if there be one, establishes the jurisdiction. So here, the petition with the offer of a stipulation, has that effect, and this jurisdiction is exclusive.

The Benefactor, 103 U. S. 239.
Providence & N. Y. S. S. Co. *v.* Hill Mfg. Co., 109 U. S. 578, 587, 600, and cases cited above.

Whether the injunction was duly issued or not, can only be properly raised on an application for an attachment for disobeying it.

Prov. & N. Y. S. S. Co. *v.* Hill Mfg. Co., 109 U. S. 600.

D. Under the rules of this Court the appraisement must be *ex parte* because the monition, which gives the only legal notice to claimants to come in, cannot be issued until after the appraisement is made.

If the notice to claimants must precede the appraisement, and the appraisement must precede the nomition no case can go on, unless the adverse parties appear voluntarily.

Appraisements under a warrant to experts are always *ex parte*. The appraisers notify no one and call no witnesses, but proceed to value the ship by personal inspection, and by their own knowledge of cost, wear and tear, and market price.

In England a warrant issues to the marshal, to appoint the appraisers.

In Massachusetts they are appointed by the Judge, and named in the warrant.

The only possible reason for notice to the adverse party that a warrant of appraisement is to be asked for, is to enable him either to show that no appraisement is necessary, which under the rule in a case of this kind he could not do, or to object to some one whom the Judge intends to name.

Of the *ex parte* appraisements in England, Dr. Lushington said: "An appraisement made by the authority of this Court is made with great care and perfect impartiality."

Cargo Ex Venus, L. R. 1. Ad. & Ecc. 50.

This is true of appraisements in Massachusetts.

There are ten cases now pending in that court, in none of which does the record show any notice, and all appear to be satisfactory.

Stipulations are always given *ex parte* in England, but the plaintiff is notified that a stipulation has been filed, and a short time is allowed him to object to the sureties.

It was formerly the practice of the Southern District of New York to take stipulations, *ex parte*, and this practice did not affect the jurisdiction.

The Thales, 3 Ben. 327.
S. C., 10 Blatch. 203.

In the case of the City of Columbus, which is reported in this Court as Butler *v.* The Boston & Savannah S. S. Co., 130 U. S. 527, appraisement was made *ex parte*, though parties on opposite sides were in court, and might have been notified; and this was admitted to be due appraisement.

E. If the appraisement was not duly made, the mistake was an irregularity which the District Court only can correct. Thus Blatchford J. —

"The fact that the vessel was bonded and discharged in the former suit without notice to the libellant makes no difference. It was not irregular according to the established practice of the Court at that time to discharge the vessel on bond without such notice

being given . . . any irregularity, if it existed, should have been corrected by a direct application to the Court, in the former suit."

The Thales, 3 Ben. 327, 330.
S. C. 10 Blatch. 203.

In the Benefactor 103 U. S. 239 the petitioner had filed no stipulation but offered to give one for the amount of an appraisal in a former suit. Mr. Justice Bradley says, p. 247, "It seems to us therefore, that the District Court, unless it has some cause to believe that the former valuation was unfairly made may adopt that valuation in the proceedings for a limitation of liability."

Appraisements and bonds are opened in the admiralty and additional valuations and sureties are ordered whenever justice requires it.

Even in actions *in rem* against a ship or goods a rearrest may be ordered when necessary, though everything has been regular.

An appraisement may always be objected to:

"If no application is made to have the appraisement set aside it is binding upon both parties."

Williams and Bruce, Admiralty Practice, 310.

So Dr. Lushington, speaking of the mode of ascertaining value, says: "The first is by appraisement, in which case, the return of the commission being a proceeding of the Court, the appraised value, *unless objected to*, binds both parties."

The Mellona 3 W. Rob. 16, 22.

Where an appraisement had been made, and a bond given to a part owner for the return of the ship, Sir C. Robinson, upon an application of the part owner, supported by his affidavit, that the valuation was too low, ordered a fresh appraisement, and an additional bond.

The Margaret, 2 Hagg. 275, note.

So where by mistake the amount of damage was stated in the [illegible] at one thousand pounds instead of two thousand six hun-

dred pounds and bail was given in the lesser sum, the Court permitted the mistake to be corrected, and the ship to be rearrested.

The Hero, Br. & L. 447.

So where the sureties, though solvent, were partners, which was against the rule or practice of the Court, a rearrest was ordered.

The Corner, Br. & L. 161.

So where the sureties have become insolvent or any other good reason is given for such action.

See

The Virgo, 13 Blatch 255.
The City of Hartford, 11 Fed. Rep. 89.
The Fairport, 8 P. D. 48, 55.
The Freedom, 3 Ad. & Eccl. 495.
The Flora, 1 Ad. & Eccl. 45.
U. S. *v.* Ames, 99 U. S. 35. 42 Per Clifford J.

In the cases of the City of Norwich, 118 U. S. 468, and the City of Columbus (Butler *v.* B. & S. S. S. Co., 130 U. S. 527), the claimants objected that the appraisements were too low because the insurance money was not included. No question was made but that the District Court could open the appraisement, but the point was decided upon its merits.

See The Dictator 1892 P. 304 & cases there cited. Amount of bond not the limit of owners liability

F. Whenever a stipulation is taken in admiralty it is a substitute "for the thing itself and the stipulators are held liable to the exercise of all those authorities on the part of the court which the tribunal could properly exercise if the thing itself were still in the custody of the court." Per Clifford, J.

U. S. *v.* Ames, 99 U. S. 35,36.
Citing the Palmyra, 12 Wheat. 1.
The Wanata, 95 U. S. 611.
The Steamer Webb, 14 Wall. 406.
[illegible]o brief of Mr. Benedict in No. 8.

an ex parte valuation is objected proceedings was made on a wrong The Anna, 47 Fed. Rep. 525

See also Mr. Justice Bradley in the City of Norwich, 118 U. S. 469,489. "The stipulation given merely stood in place of the vessel itself and did not deprive the court of any of its powers."

In *ex parte* Slayton, 105 U. S. 451,453, the return did not show that the trustee had collected the remnants of the wreck and brought them within the district, but the freight money which had been paid over was held sufficient to give jurisdiction.

JOHN LOWELL,
JOHN LOWELL, JR.,
WM. D. SOHIER.

147 U.S. 14

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1892.

ORIGINAL DOCKET Nos. 8 and 9.

IN THE MATTER

OF

HENRY MORRISON'S Petitions for Mandamus and Prohibition.

PETITIONER'S COMMENTS

ON THE

BRIEFS IN OPPOSITION.

C. G. Burgoyne, Walker and Centre Sts., N. Y.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1892.

ORIGINAL DOCKET NOS. 8 AND 9.

IN THE MATTER
OF
HENRY MORRISON'S Petitions for Mandamus and Prohibition.

PETITIONER'S COMMENTS ON THE BRIEFS IN OPPOSITION.

I.

Proceedings in bankruptcy do not furnish any safe analogy.

Judge Lowell's Brief, p. 4.

A. Bankruptcy proceedings are anomalous. They rest on a special constitutional provision. It may well be doubted, we think, whether many of the so-called adjudications in bankruptcy are, properly speaking, judicial judgments, *i. e.*, acts of Courts which are effective under and by virtue of the judicial power. Take, *e. g.*, the so-called adjudication that a voluntary petitioner is a bankrupt. A Judge must be satisfied that the allegations of the petition are true, but no

creditor can traverse them or be heard upon them (Bump. Bankruptcy, 10 Ed., pp. 20, 21; Wilson vs. City Bank, 17 Wall., at pp. 481, 482). Is that a judicial judgment? Would not the result be the same in point of effectiveness if Congress were to designate an executive officer to receive the petition, satisfy himself of the truth of it and make the decree?

The adjudication of bankruptcy creates a legal *status* like marriage or slavery, and that status is a *res* upon which subsequent judicial proceedings may be taken *in rem* upon the mere publication or mailing of notices or service outside the territorial jurisdiction.

B. Limited liability proceedings (under R. S., Sec. 4284), on the contrary, must be judicial proceedings deriving their effectiveness solely from the judicial power. In other words, such proceedings cannot be effective upon the rights of persons interested adversely to the petitioner, unless notice and an opportunity for a hearing are given in advance; and, if no property in which the petitioner's adversaries have a specific interest is taken into the Court's possession, there is no *res* to serve as a basis for proceedings *in rem*, and the notice must therefore necessarily be a personal notice within the territorial jurisdiction.

There is no legal *status* to serve as a basis for *in rem* proceedings. A collision of ships, even as to the owner of a ship in fault, no more creates a status than a railroad accident does.

C. To appreciate truly the supposed bankruptcy analogy, one needs to imagine what the allegations of a voluntary petition in bankruptcy on the lines of the Metropolitan Steamship Company's petition here would be. Something like this, we fancy:

> "If your Honor please, I am not a bankrupt. I don't owe any man anything. But one man, Vanderbilt, claims that I owe him a great deal—more than all my property is worth.

He don't live in your Honor's District, and your process cannot reach him; but you can publish a summons in a newspaper, and I will see that he gets a copy at his residence. I don't want to convey my property to an assignee. I want to use it. But if your Honor will put on your hat and come round to my place and set a value on the property, or have some one of your acquaintance, who you think knows about values, do it, I will deposit the amount in court or give a bond for it. Wherefore, I pray your Honor to adjudge that I don't owe Vanderbilt or any one else one cent and that I am not a bankrupt; but, if I do owe what Vanderbilt claims, I pray your Honor to adjudge me a bankrupt, and, applying the amount of my deposit or bond to Vanderbilt's claim as far as it will go, I pray your Honor to discharge me from all further liability, and to enjoin Vanderbilt and everybody else perpetually from suing me on any claim up to this date."

Did any one ever hear of such a bankruptcy petition as that?

Suppose the bankruptcy court entertained such a petition, and having posted a notice in the Court House and published it in a newspaper, and caused it to be delivered to Vanderbilt at his residence out of the district, proceeded to decree that the petitioner was not a bankrupt, that he did not owe Vanderbilt anything, and that Vanderbilt and everybody else be forever enjoined from prosecuting any claim, what would the decree amount to? Our adversaries must satisfy the Court that such a decree would be valid and binding upon Vanderbilt and all the world before they can find in the law of bankruptcy any real support for their argument in this case.

II.

As to Judge Lowell's Points B and C.

The filing of a petition by a shipowner containing a proper offer and submission on his part would no doubt give the Court where the petition is filed jurisdiction. We do not dispute it. But jurisdiction to do what and to proceed how?

Certainly, on the mere filing of the petition, the Court could not make any adjudication whatever without giving the petitioner's adversaries an opportunity to be heard. The Court must first either get the control of some property in which the petitioner's adversaries have a specific interest, or cause its process to be served upon those adversaries within its territorial jurisdiction before it can perform any judicial act that will affect in any manner the rights of those adversaries. And certainly, the jurisdiction of subject matter which arises out of the filing of the libel cannot be exclusive so long as the Court is not in a position to make a decree binding upon the petitioner's adversaries.

We do not think that our learned and most highly esteemed opponents mean to evade anything. Perhaps we ourselves are blind. But the fact is that we have searched the briefs through in a fruitless endeavor to find a legal reason for regarding such a proceeding as Judge LOWELL describes under his Point C, as an *in rem* case. Judge LOWELL says (p. 4): "The shipowner's submission to the jurisdiction is the *res*." What does that mean? The language is figurative and ambiguous. Does it mean that the shipowner's *status* is the *res?* If so, it would be interesting to have an explanation how any matter of *status* is involved in a petition by a shipowner which alleges that his ship was not in fault for a collision. Or does it mean that the fund which the shipowner asserts is the value of

his ship and pending freight, is the *res?* If so, what is the interest of damage claimants in that fund specifically which justifies the making of it the basis of a determination *in rem* as to their rights?

The real reason why counsel say that such a proceeding is a proceeding *in rem* is that they conceive it to be necessary to regard the proceeding so in order to make the remedy of R. S., Sec. 4284, simple, easy and perfect for shipowners. Granted, for argument's sake, that a perfect, simple and easy remedy cannot otherwise be worked out; is that a valid reason for regarding the proceeding as one *in rem?* Is the distinction between suits *in rem* and suits *in personam* so shadowy and insubstantial as that a suit may have the legal character of being one or the other according to the result to be accomplished?

III.

As to Judge Lowell's Point D.

A. Suppose counsel is right in the argument that the Admiralty rules of this Court contemplates an *ex parte* appraisement. Does the bond given pursuant to the appraisement furnish a basis for a determination in *rem* as to the rights of damage claimants? How can that be unless damage claimants have an interest in the fund represented by the bond? and how can they have any interest in that fund unless their rights against the ship owner personally and against his ship have been transferred to the fund? And how, consistently with the Constitution of the United States, can such a transfer be made without first giving damage claimants an opportunity to be heard? *Does due process*

of law under the judicial power mean an entirely different thing in respect to equity and common law cases?

B. Neither the English Admiralty practice nor any other Admiralty practice has anything to do with the questions which we raise. Those questions are not questions of practice; they are questions of substantive law and of American Constitutional law.

Moreover, in the English practice as we understand it, the giving of the stipulation for the amount arrived at by *ex parte* appraisement is not the operative thing. The stipulation is not a substitute for property, and rights are not transferred from property to the stipulation merely by the filing of the stipulation, but by the sealing and issuance of the release, and before that is done, as Judge LOWELL says, "the plaintiff is notified that a stipulation has been filed," and if he is not satisfied with it, he has an opportunity to be heard before his rights against property and against the owner of property are transferred to the stipulation.

The case of James vs. London & S. W. Railway, Law Reports, 7 Exchequer, 187, and in the Exchequer Chamber, at page 287, shows what the legal character in the English courts of wholly *ex parte* proceedings in admiralty in the creation of a substitute or equivalent for a ship or its proceeds is. Such proceedings are nullities, and the English courts prohibit the admiralty from proceeding further thereon.

The *Thales*, 3 Ben., 327, 10 Blatchford, 203, was not a case involving an admiralty stipulation, but a bond under the Act of Congress (now R. S., Sec. 941). Such a bond does not purport to be for the value of the property attached. Under the Act of Congress it must be "in double the amount *claimed*."

C. Whatever the fact may have been as to the appraisement in the case of the *City of Columbus* (130 U. S., 527) the transcript of record showed to this

Court merely the bald statement that the appraisement was *duly* made and the stipulation *duly* given, and the questions which were raised by the appeals in this Court were raised by a party who had appeared in the Court below. The decision of the appeals did not even by implication involve any of the questions which we now raise.

IV.

As to Judge Lowell's Point E.

A. We do not claim that the stipulation given in the Massachusetts' Court was a mere irregularity. Our claim is that that stipulation is absolutely without any effect upon our rights.

B. We have no doubt that the stipulation in the collision case to which Mr. Justice BRADLEY referred in *The Benefactor*, 103 U. S., 239, could play the same part in a limited liability case that the ship itself, for which that stipulation was given, would play, if the petitioner chose to proceed against the stipulation, as he might against the ship, if there had been no stipulation. But as appears by the decision in the "City of Norwich," 118, U. S., 468, such a stipulation is not the fund for distribution. How could any one ever suppose that it was when it does not include the freight, and when the ship itself may have greatly increased or decreased in value between the termination of the voyage and the time of taking the stipulation?

C. The English admiralty practice of ascertaining value by an *ex parte* appraisement, and making such an appraisement binding (unless objected to), if done

with the knowledge and at the instance of one party, but without the other party knowing what is going on, is, on the face of it, radically unjust and wrong, and ought not to be countenanced in our law.

It is liable to throw a heavy burden upon and handicap the party who has no notice. As MARTIN, B., said, in James vs. London & S. W. Railway Co., Law Rep., 7 Exchequer, at page 200: "It is an essential principle of justice that, if a court proposes to make an order affecting a man's rights he is entitled to be heard against that order before it is made. That is the effect of the cases cited in Vroom's Legal Maxims, 5th Ed., p. 113, and upon that ground alone I should be prepared to hold those proceedings in the Admiralty Court defective. The order of the 4th of June, 1870, appears to me to be a mere nullity."

V.

As to Judge Lowell's Point F.

The sweeping statement that "whenever a stipulation is taken in admiralty, it is a substitute for the thing itself," &c., is negatived and rendered worthless by a single exception, and that exception is furnished by the case of *James vs. London & S. W. Railway, supra.*

We deny the statement, and on the contrary assert that no stipulation for value in admiralty, which is taken without notice of some kind and an opportunity to be heard given to the persons whose rights are to be affected thereby, is, or under the Constitution can be, a substitute for the thing itself; and the issue thus made we submit to a Court which has said: "It was not within the power of the jurisdiction of the District Court to proceed with the case so as to affect the rights

of the owner after his appearance had been stricken out and the benefit of the citation to him thus denied. *For jurisdiction is the right to hear and determine; not to determine without hearing;*" to a Court which has adopted, with approval, the following opinion of the Supreme Court of Vermont: "A proceeding professing to determine the right of property, where no notice written or constructive is given, whatever else it might be called, would not be entitled to be dignified with the name of a judicial proceeding. *It would be a mere arbitrary edict not to be regarded anywhere as the judgment of a Court;*" to a Court which has said. "Mr. Justice STORY said that it did not strike him that any sound distinction could be made between a sentence pronounced *in rem* by a Court of Admiralty and Prize, and a like sentence pronounced by a municipal Court upon a seizure or other proceeding *in rem;* that in each the sentence was conclusive as to the title and property, and * * * was equally conclusive as to the facts on which the sentence professed to be founded. But the learned Judge added that it was an essential ingredient in every case, when such effect was sought to be given to the sentence that there should have been proper judicial proceedings upon which to found the decree; that is, * * * *that there should be some personal or public notice of the proceedings so that the parties in interest, or their representatives, or agents* * * * *might have an opportunity to defend themselves.* * * * It is a rule, said the learned Judge, founded in the first principles of natural justice that a party shall have an opportunity to be heard in his defense before his property is condemned. * * * If a seizure is made and condemnation is passed * * * without any public notice of the proceedings so that the parties in interest have no opportunity of appearing and making a defense, the sentence is not so much a

judicial sentence as an arbitrary sovereign edict. * * * It amounts to little more in common sense and common honesty than the sentence of the tribunal which first punishes and then hears the party—*castigatque,auditque.* * * * *It* * * * *is but a solemn fraud* if it is clothed with all the forms of a judicial proceeding" (Windsor vs. MacVeigh, 93 U. S., 274).

VI.

As to Mr. Benedict's Brief.

May he pardon us for saying plainly what we think: The brief is one long *petitio principii.*

To illustrate, Mr. Benedict quotes from an opinion of this Court to the effect that the operation of the Limited Liability Act cannot be regarded as confined to cases of actual transfer to a trustee, but must be regarded "as extending to cases in which what is required and done is tantamount to such transfer as where the value of the owner's interest is paid into Court or secured by stipulation and placed under its control for the benefit of the parties interested."

We do not doubt this. What we say is that the value of the owner's interest cannot be regarded as paid into Court or secured by stipulation, until the value has been judicially ascertained after a hearing of the persons interested. Nothing less than such a judicial ascertainment of the value and the payment (or securing the payment) of the ascertained amount, is tantamount to a transfer of ship and freight to a trustee. Are these propositions sound? That is the question. As we believe, Mr. Benedict sheds no light upon it.

ELIHU ROOT,
S. B. CLARKE,
Of Counsel.

FILED
DEC 12 1892
JAMES H. McKENNEY,
CLERK.

United States Supreme Court

In the matter of the Petition of

HENRY MORRISON,

For a Mandamus,

DIRECTED TO THE

DISTRICT COURT OF THE UNITED STATES

FOR THE SOUTHERN DISTRICT OF NEW YORK.

BRIEF IN OPPOSITION TO THE MOTION.

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68 WALL STREET,
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C. H. JONES & CO., PRINTERS, 114 FULTON STREET.
1892

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United States Supreme Court.

In the Matter

of

The Petition of Henry Morrison for a mandamus directed to the District Court of the United States for the Southern District of New York.

Brief in Opposition to the Motion.

And now R. D. Benedict, of counsel for the Hon. Addison Brown, Judge of the District Court above mentioned, and also of counsel for The Metropolitan Steamship Co., respondent in the suit of said Henry Morrison, in said petition referred to, presents the following Brief in opposition to the motion that a mandamus issue as prayed for in said Petition.

FACTS.

The Petition and the papers attached thereto set forth the proceedings in the suit brought in the District Court of the United States for the Southern District of New York, with substantial accuracy.

One or two statements in the Petition, however, are not sustained by the papers attached thereto, and are therefore corrected as follows:

1st. It is stated in Paragraph C of the Second Article of the Petition, that the said District Court

"dismissed your petitioner's said libel *as improperly filed*" (Pet., p. 6). This statement is repeated in the first point of Petitioner's new Brief on p. 8.

It will be seen, by a reference to the order itself, that the words above italicized in the quotation do not appear in the order (Pet., p. 64), which reads that "the libel of the libelant herein be and the same is hereby dismissed."

It is added in the order that the order is made "upon the grounds and for the reasons stated in the opinion"; and an examination of the opinion will show that the ground and reason of the decision are there stated as follows: "I must hold the prior proceeding in the Massachusetts District to be valid, and the present libel *therefore* improperly filed."

The effect of this correction will be hereafter considered.

2d. The Petition also alleges, in the same paragraph (Pet., p. 6), that the said Court "so declined to entertain and adjudicate your petitioner's said cause."

If this be taken as anything more than the petitioner's *opinion* as to the action of the District Court, it is an error. If it is only a statement of an opinion, such opinion is, as I shall show, equally erroneous.

3d. Paragraph D of said Article contains the allegation that "the only pleadings and proceedings in said cause which have been taken and are referred to in said order" were what are in said paragraph specified.

This is an error. The order, at p. 63 of the Petition, which was made on the return of the order to show cause set forth at p. 22 of the Petition, sets forth the papers on which it was made, some of which are not specified in Paragraph D of the Petition. Reference should therefore be had to the order itself, at p. 63.

FIRST POINT.

This is not a case in which this Court will grant a writ of mandamus. It will leave the Petitioner to his remedy by appeal from the decree of the District Court.

a. The practice of this Court as to issuing writs of mandamus is well settled. It will not allow the application for that writ to be used in place of a writ of error or appeal.

> "This motion is denied because it is an attempt to use the writ of mandamus as a writ of error to bring here for review the judgment of the Circuit Court upon a plea to the jurisdiction."
>
> *Ex Parte* Railway Co., 103 U. S., 796.

> "It has often been held that mandamus cannot be used to perform the office of a writ of error."
>
> *Ex Parte* B. & O. R. C., 108 U. S., 566.

> "After a case has proceeded to the filing of a declaration and a plea to the jurisdiction or its equivalent, and a judgment is rendered in favor of the plea, and a consequent dismissal of the action, this Court has held that the plaintiff is confined to his remedy by writ of error, and cannot have a mandamus, which only lies, as a general rule, where there is no other adequate remedy."
>
> *In Re* Penn. Co., 137 U. S, 453.

This last case is cited in the Petitioner's Brief, with others. I have examined the other cases, but find nothing in them holding otherwise.

b. It is claimed in the First Point of Petitioner's Brief (p. 8) that the District Court "did not decide Morrison's cause, but refused to entertain it."

It might just as well be said, in any other cause in which the Court has dismissed the libel, that it "refused to entertain" the cause. The Court decided that by reason of the facts which were brought before it, *i. e.* by reason of the suit in the District Court of Massachusetts, Morrison's libel was improperly filed. And it thereupon dismissed the libel. When it so dismissed the libel, it made a final decree, from which an appeal can be taken, under the provisions of the 5th Section of the Act of 1891, to this Court or else to the Circuit Court of Appeals.

c. If it be held that the question involved in the motion of the respondent to dismiss the libel was the question of the jurisdiction of the Court, then that motion was an "equivalent" for a plea to the jurisdiction. And no objection having been made by the Petitioner to the form in which the question was raised, and the Court having thereupon made a decree dismissing the libel, the substance of the matter is to be considered, and any defect in the form of raising the question must be held to have been waived. The case in this aspect would be governed by the case in 137 U. S. above cited.

d. But if, on the other hand, it be considered that the question was not one of the jurisdiction of the Court, but that the motion set up as a *defense* the existence of the Massachusetts proceeding and the provision of the statute (U. S. Rev. Stat., § 4285), that on such proceeding being had "all claims and proceedings against the owner shall cease," still the result is the same. The motion brought before the Court, in a mode accepted by both parties, the effect of the proceeding in Massachusetts.

And the Court held that the prior existence of that proceeding called for the dismissal of the libel and therefore dismissed it. If that was error, it can only be remedied by an appeal.

The decision of the New York Court was that the Massachusetts proceeding "was valid." On that

decision, the decree followed that the New York libel be dismissed.

d. Whether therefore the decision of the District Court in New York was based on the ground that it had no jurisdiction to entertain the petitioner's suit by reason of the proceeding in Massachusetts, or on the ground that the Massachusetts suit was valid and therefore was a defense to the petitioner's action, in either case, there was a final decree from which an appeal can be taken. The application for a mandamus should therefore be denied, on the ground that the writ would be an inappropriate remedy.

SECOND POINT.

The petition for Mandamus should be denied because the decree of the District Court of the Southern District of New York dismissing the petitioner's libel was correct as a matter of law.

The proceeding in limitation of liability before the District Court for the District of Massachusetts was a valid one, and its existence was a bar to the commencement or the prosecution of the petitioner's suit before the District Court for the Southern District of New York.

a. That proceeding was taken in the proper District and it was conducted according to the rules provided by this Court in that behalf.

No suggestion is made either in the Petition or the Brief for petitioner that the Massachusetts District was not the proper District in which the owners of the H. F. Dimock could take proceedings to limit their liability. Nor could such an objection be maintained. That was the proper District as

provided by the fifty-seventh Admiralty Rule (130 U. S. Rep. Appendix).

And the Massachusetts District being the proper District, as provided by Rule 57 of this Court, that Rule provides that "*the said proceedings* may be had, etc."

What are *the said* proceedings? Manifestly the proceedings provided for in Rules 54, 55 and 56.

Those proceedings are as follows:

1. The owner "shall and may file a libel in the proper District Court of the United States setting forth the facts and circumstances on which such limitation of liability is claimed and praying proper relief in that behalf." (Rule 54.)

> This libel was filed in the proper District Court, *i. e.* the Massachusetts District Court.
>
> It set forth the facts and circumstances on which such limitation of liability was claimed.
>
> It prayed proper relief in that behalf. (Pet. pp. 35 to 41.)

2. The Court must cause "due appraisement to be had." The appraisement proceedings appear on pp. 42 to 44 of the petition. They were a warrant to the Marshal directing him to cause the vessel to be appraised by three persons therein named, the oath of the appraisers and the return of the Marshal with the appraisement attached.

> And the Court in the order for the giving of the stipulation (Pet. p. 45) decided that it appeared to the Court "*that due appraisement has been had.*"

3. After such appraisement the Court "shall make an order for the payment of the same into Court, or for the giving of a stipulation with sureties for payment thereof into Court whenever the same shall be ordered."

> Here the Court made the order in the latter form, for the giving of a stipulation. (Pet. p. 45.)

4. The stipulation must be given as ordered.

It was so given. (Pet. p. 46.)

5. The Court "shall issue a monition against all persons claiming damages, etc."

This Court issued such a monition. (Pet. p. 51.)

6. The Court shall also "make an order to restrain the further prosecution of all and any suits against said owner or owners in respect of any such claim or claims."

The Court made such an order. (Pet. p. 48.) A copy of this order was personally served on Wm. H. Vanderbilt at Newport, R. I., on September 16, 1892, (Pet. p. 50) fourteen days before the filing of Morrison's libel, and Vanderbilt furnished an affidavit that he had received a copy of the monition and of the injunction order. (Pet. p. 60.) The order set forth the proceedings which had been taken. (Pet. p. 48,)

A copy of the monition and of the restraining order was also served on Root & Clarke, the counsel for the Petitioner and proctors for Vanderbilt (Pet. p. 30); and the statement in the affidavit of Mr. Dimock that the existence of the Massachusetts proceeding was known to Morrison, (Pet. p. 31) is substantially admitted by Morrison's affidavit (p. 58) that he had no notice of the Massachusetts proceedings "until they had taken place," and by the lack of any allegation on his part that he had no notice of them before the filing of his libel.

The suit in the Massachusetts District Court was therefore brought in the proper District. It was conducted according to the Rules of practice provided in that behalf by this Court.

The Statute provided that on such proceedings being had "all claims and proceedings against the owner shall cease." And the Massachusetts Court had ordered that "all persons claiming damage * * be and they are hereby enjoined from

prosecution of all and every suit or suits against the * * * owner of the H. F. Dimock, or against said steamship in respect of any claim arising out of the collision aforesaid except in those proceedings."

And the petitioner was aware of those proceedings when he filed his libel in the District Court in New York.

b. But the petitioner maintains that notwithstanding such knowledge on his part of the Massachusetts proceeding he had a right to file his libel and commence his suit in the District Court in New York, because the suit in Massachusetts was invalid.

The principal objection of the petitioner to the validity of the suit in the Massachusetts Court seems to be that the Court had no authority to act and that the statutory injunction did not exist, because there was in that case no transfer of the vessel to a Trustee.

For it is claimed (Brief, p. 23) that the Limited Liability Act "does not provide any new means or machinery for accomplishing the result except through a transfer to a trustee; and it leaves shipowners to ordinary judicial proceedings, with all the existing limitations upon such proceedings, if they would accomplish the intended result *otherwise than through a transfer to a trustee.*"

It would seem to be a sufficient answer to this claim to quote the following language from the decision of this Court in the case of Prov. & N. Y. S. S. Co., *vs.* Hill Man. Co., (109 U. S., p. 600.)

"The operation of the Act in this behalf, cannot be regarded as confined to cases of actual 'transfer' (which is merely allowed as sufficient compliance with the law) but must be regarded, when we consider its reason and equity and the whole scope of its provisions, *as extending to cases in which what is required and done is tantamount to such transfer, as where the value* of the owner's interest is paid into Court or *secured by stipulation* and

placed under its control for the benefit of the parties interested."

This language of the Supreme Court is a quite sufficient answer to this objection. And the same decision was repeated in the case of The City of of Norwich. (118 U. S., p. 498., and again p. 502.)

c. It was claimed by the petitioner in his original Brief (p. 9, Point D.) that the District Court cannot "proceed" *in rem* "except upon a manucaption of the *res*," and it was claimed that as the H. F. Dimock was "never attached by any process," therefore the proceeding had no validity.

And this position is renewed in the second Brief of the petitioner's counsel (p. 18 and p. 25).

But this claim shows a confusion of terms or a misapprehension as to the Admiralty practice.

If the statement had been that the Court could not "proceed *to final decree* in a case *in rem* without a manucaption of the *res*, or *an equivalent for it*," it would have been correct.

But the power of the Court "to proceed" in a case *in rem*, is dependent only on the filing of a libel setting forth a case within the jurisdiction and invoking the exercise of such jurisdiction.

Whenever such a libel is filed the Court has power "to proceed." In many cases its first proceeding is a manucaption or seizure of the *res*, no doubt. But in many cases there is no seizure but a substitution of a stipulation for the *res*. And in either case the power of the Court to proceed to interlocutory proceedings is unquestionable. Thus in the Act of 1847 (now § 941 of the Revised Statutes), it was provided that, if the claimant of a vessel furnished to the Marshal a bond in the form provided, "it shall be the duty of the Marshal to *stay the execution of such process*, or to discharge the property arrested, if the same has been levied." In all cases, therefore, in which the bond was delivered to the Marshal before seizure, there never was a seizure of the *res*.

And the cases are innumerable in which stipula-

tions for value are filed as a substitute for the *res* without a seizure thereof. But it never was claimed that there was any defect in the jurisdiction of the Court in such cases.

The Supreme Court, when it made the Rules for Proceedings in Limited Liability, must be presumed to have had in mind this well known practice of the snbstitution of a bond or stipulation for the *res* without a seizure.

And so we find that the 54th and 57th Rules of the Supreme Court make provision for the taking of a stipulation as the *res*, in limitation of liability proceedings, but none whatever for the issuing of any process against the vessel. I know of no case in which, in such proceedings, the vessel has been seized under process. The question was alluded to and the power to issue process doubted in the case of The John Bramall (10 Ben., 510).

The reason why seizure is not required is plain, viz., that the owner of the vessel is himself the party who invokes the jurisdiction of the Court, and who must put the Court in possession of the fund to be distributed. A seizure of the vessel by process is therefore unnecessary. And it is entirely immaterial in which one of the three ways provided the owner acts. Whether he transfers the vessel to a trustee appointed by the Court, or pays into the Court the appraised value, or gives to the Court the stipulation to pay, which the Rules provide for, in either case the Court will then have the fund, and, after whatever notice is required to be given has been given, the Court can make the final decree.

But the preliminary proceeding to ascertain the amount of the fund, or to appoint the trustee, is one which must be taken in either case *before the Court receives the fund.* And this preliminary proceeding the Court has jurisdiction to take, as soon as a libel or petition is presented setting forth facts which bring the matter within the jurisdiction of the Court.

The Massachusetts Court therefore, on the filing

of the petition of the owners of the H. F. Dimock, which set forth facts showing that the case was one within the jurisdiction of the Court, had power to take such preliminary proceeding. It had power, therefore, to make the necessary due appraisement to ascertain the amount of the fund, and power, on such appraisement made, to take a stipulation, which, as soon as it was taken, became the *res* in possession of the Court.

d. The petitioner further takes the ground that the Massachusetts suit had no validity, because, as he claims, the appraisement which the Court made was not a "due appraisement" (original Brief, p. 9).

There are several answers.

1. Whether there was an error in the proceedings to make that appraisement or not makes no difference with the validity of the proceeding, for the mode of the appraisement is not a matter affecting the jurisdiction of the Court.

2. The order of the District Court of Massachusetts recites that "it appears to the Court that *due appraisement has been had.*" Here is a decision of Massachusetts Court that the appraisement was "due." If that decision had been erroneous, it could not be attacked in this collateral way.

The District Court of the Southern District of New York had no power to review the decision of the District Court of Massachusetts and to decide that an appraisement was not "due," which that Court had decided to be "due."

The Rule of the Supreme Court having only provided that the Court must "cause due appraisement to be had" must have intended that each Court should perform that duty according to its own practice.

It could not be, that when one of the District Courts, acting according to its own practice, had caused an appraisement to be made and decided that such was a "due" appraisement, it still remained open for each of the other District Courts to assume to inquire what had been the practice

pursued and to decide that the appraisement was not "due," because such practice had not conformed to its own. Such a condition of things would be utterly inconsistent either with the equal powers of the District Courts, or any sort of comity between them, or any proper view of the effect of judicial proceedings, or any sort of relief to shipowners by the Rules.

There is no middle ground. Either the decision of one District Court, that an appraisement has been "due" because according to its practice, must be accepted *for that case*, as binding upon the other District Courts, or else, each District Court has the right to inquire into the practice under which an appraisement so pronounced "due" was held, and, if that practice did not agree with its own, to decide that no "due" appraisement has been had. The confusion which would result from such a condition of things is a sufficient argument against the claim of the petitioner.

This conclusion is also clearly sustained by the language of this Court, in the case of The Prov., &c., Co. *vs.* The Hill Man. Co., (109 U. S., p. 593) in which, after saying that the Court had no doubt of its power to make the rules, it added "and where the general regulations adopted by this Court do not cover the entire ground, it is undoubtedly within the power of the District and Circuit Courts, as Courts of Admiralty, to supplement them by additional rules of their own."

That is, of course, that each District Court has that power.

And therefore the Supreme Court having only provided that the District Court should cause "due" appraisement to be made, but not having specified what should be such "due" appraisement, it was within the power of the District Court of Massachusetts, either by order in the special case, or by general rule or practice covering all cases, to say what was a due appraisement; and having done so, the other District Courts have no power

to say that an appraisement so made was not "due" for that case.

3. But to go farther. The ground on which the Petitioner claims that the appraisement was not "due" is that no notice was given to Morrison.

But the Rule does not require notice to be given and the use of the word "due" does not imply notice.

This question was involved in the case of The Prov., &c., Co., *vs.* Hill Man. Co. (109 U. S., p. 579.)

The following facts as to the limitation proceeding which was there involved are stated in the opinion of this Court in that case (p. 581) viz., That the libel stated a proper case and prayed that the Court "would cause due appraisement to be had," &c.; that "Upon said libel the said District Court caused due appraisement to be had and made," &c., and made an order for the giving of a stipulation for the amount; that the libellants gave the stipulation; that "a monition was thereupon issued" by the Court and "ordering public and other service of said monition as therein set forth *and that said notice had been served on the said* Hill Manufacturing Company pursuant to said monition;" and that the Court made an order restraining the prosecution of suits. (See again on p. 585.)

It will be seen by the above statement that The Hill Manufacturing Company is not stated to have received any notice of the proceeding until the service of the *Monition*, which was not issued until *after the appraisement was completed.*

Lest this should, however, have arisen from some incompleteness of statement in the opinion of this Court in that case, I have examined the Record in the limited liability proceeding in the District Court, for the Southern District of New York, and find this statement of the case to be accurate. No notice to The Hill Manufacturing Company of any proceeding in that matter appears in that Record until the proof of the service of the Monition and

the restraining order, which was made by a personal service on their attorneys in Boston, Mass., on July 30, 1872, the appraisement having been made in the May previous.

The Petitioner here is therefore in exactly the situation, as far as notice is concerned, in which was The Hill Manufacturing Company in that case. And the decision in that case is therefore an exact authority against the Petition here.

4. And furthermore the giving of notice is utterly impracticable.

If notice to any one claimant is essential, notice to every claimant must be equally so. If notice to Morrison or Vanderbilt must have been given, notice must have been given to every one else who had a claim.

Personal notice could not be given. Morrison and Vanderbilt were not within the reach of service of notice in the District of Massachusetts (they maintain that the service of the injunction order of the Court was not valid because they were not within that District), and it appears by petitioner's libel that they are not the only persons having claims (Pet., p. 13).

To claim that personal notice, to each one of the persons having claims which are sought to be limited, must be given before the institution of a suit to limit such liability, is to claim what would make such a proceeding an impossibility in ninety-nine cases out of a hundred.

Personal service of the monition which is the foundation of the final decree, is not required. *A fortiori* personal service of notice of the appraisement proceedings cannot be requisite.

It may be said that service of notice of the appraisement proceeding might be made by publication as the service of the monition may be, and therefore such a publication should be required.

But, if publication for three months of notice of the appraisement proceedings were made necessary,

then every ship owner who wished to limit his liability would be compelled to tie his vessel up in advance for those three months. Because, if he ran her for those three months, he would encumber her with new liabilities, inconsistent with the limitation of the old ones.

It is not to be supposed that this 54th Rule of the Supreme Court was adopted without consideration of the matter or that the failure to require notice before appraisement was an accidental omission. Whatever may have been the actual reasoning which led to such a framing of the Rule it may be permitted to counsel to say that the following reasoning would seem to be abundantly sufficient for the choice of the present form of proceeding, viz.:

"If previous notice of the appraisement proceedings is indispensable it must be a notice to all claimants.

"Such a notice can rarely be personally served on all claimants and therefore the Rule could only require service by publication, and such a service, to be of use, should be by publication for three months.

"If such a service is made requisite, the ship owner must tie his ship up during those three months. But ships were 'made to plough the sea, and not to lie by the walls.'

"Therefore no such service of notice should be required, if the rights of claimants can be preserved without it.

"The claimants are interested to have the appraisement a fair one, and in no other way. If then it is provided in the Rule that the *Court* to which the ship owner applies shall *cause a 'due appraisement'* to be had, the rights of the claimants are all put under the protection of the Court, and they will therefore be preserved by this requirement of the Rule, especially as, if any claimant, who comes in after the Court's appraisement has been had, has cause to be dissatisfied with it,

it is always open to him to apply to the Court to have its appraisement opened for a new investigation."

If the present form of the Rule had been based upon such a process of reasoning, I fail to see what answer to it can be suggested. Certainly none is suggested in the petitioner's brief.

When the matter was first brought before this Court in Norwich Co. *vs.* Wright (13 Wall, 125) the language of the Court upon this point was as follows:

"The owners should file a proper petition for an apportionment of the damages according to the statute and should pay into the Court * * * *or* give due stipulation for such sum as *the Court may by proper inquiry* find to be the amount of the limited liability *or else* surrender the ship and freight by assigning them to a trustee in the manner pointed out in the 4th Section. Having done this, the shipowner will be entitled to a monition to all persons to appear and intervene *pro interesse suo* and to an order restraining the prosecution of other suits."

Looking at the Rules in the light of this language, it is plain that the first notice that is required to be given to other parties is the service of the monition.

THIRD POINT.

The objection made by the Petitioner that the giving effect to the Massachusetts suit is depriving the Petitioner of his rights without due process of law has no foundation.

a. The first answer to this objection is that the Petitioner has not been deprived of any right. His right remained the same, after the Massachusetts Court received the stipulation and thereupon made the restraining order, as before. The only change in his situation was that he must come into the Massachusetts Court to enforce his right.

b. The right, which the Petitioner there speaks of as his, is the right to "bring his suit against the steamship Company and the steamship in the New York Court." (Original Brief, p. 6.)

> In passing we may inquire how the Petitioner, who is a citizen of Pennsylvania, acquired a right to sue a Massachusetts Corporation in a Court in New York.

But, if he had such a right, that certainly was not a right which could not be taken away from him *by Statute.*

Will it be claimed that the provision of the Act that "from and after such transfer all claims and proceedings against the owner shall cease," is depriving the one who holds the claim of his right, without notice and hearing or without due process of law?

Will it be claimed that the Steamship Company could not have made a transfer of the Steamer to a Trustee, *except after notice to all claimants?* or that, if it had done so, they would still be allowed to prosecute their claims elsewhere? Such a claim could hardly be made?

But, if it be held (as it must) that if the Steam-

ship Company had made such transfer to a Trustee appointed by the District Court of Massachusetts, Morrison's prosecution of his claim elsewhere "must cease," and the right, whatever it was, to bring suit anywhere else than in the District Court of Massachusetts and in that proceeding, was gone; then the only question which could be raised would be whether such statutory injunction was confined to the case of a transfer of a vessel to a Trustee, or was equally effective where the owner had taken the equivalent proceeding of an appraisement by the Court and a stipulation.

And on this question the case of The Prov., etc., Co. *vs.* The Hill Man Co. is decisive, as quoted above on p .

FOURTH POINT.

If the Massachusetts proceeding had validity in Massachusetts to stop another suit from being brought in that District, it had the same effect in the Southern District of New York.

a. The Statute says that from and after such transfer all claims and proceedings against the owner *shall cease.*

This Court has held that this provision applies where, instead of making a transfer of the vessel to a trustee, the owner makes a transfer of the fund to the Court, or gives a stipulation for it to the Court.

Now the Statute does not say that all claims in any particular District shall cease, but that *all claims* shall cease; and this means that they shall cease as well in New York as in Massachusetts.

b. But the Petitioner urges (Brief, p. 9, 10, G.) that the fact that the H. F. Dimock left the District of Massachusetts without leave of the Court was

"an abandonment by the Steamship Company of its proceeding in Massachusetts." And this claim is renewed in the new Brief on p. 18.

This proposition overlooks the well known rule in the Admiralty that the giving of a stipulation for the ship discharges the lien.

Abundant authority could be cited for this proposition but it will be sufficient to quote the language of this Court in the case of The City of Norwich (118 U. S., 502).

"The absolute declaration of the Statute, that his liability shall not exceed the amount or value of the ship and freight, to wit, at the termination of the voyage, has the effect when that amount is paid into Court under judicial sanction, of discharging the owner's liability and thereby of extinguishing the liens on the vessel itself and of transferring those liens to the fund in Court. This is always the result when the owner is allowed to bond his vessel, by payment of its appraised value into Court, or *by filing a stipulation with sureties* in lieu of such payment. The vessel is always *discharged from the liens* existing upon it, when it has been subjected to a judicial sale by order of the Admiralty Court, or *when it has been delivered to the owner on his stipulation with sureties.*"

The steamer in this case therefore was discharged from any lien on her of the claim of Morrison or Vanderbilt, by the giving of the stipulation.

What happened to her afterwards was entirely immaterial either to the lienholder, the owner or the Court.

The proceeding of the owner in the Massachusetts Court was no more affected by the leaving port of the H. F. Dimock, than by the leaving port of any other steamer in Boston.

FIFTH POINT.

The objections urged against the power of the Massachusetts Court to adjudicate upon the controversy are not valid.

a. It is said that The Metropolitan Steamship Company did not submit itself sufficiently to the jurisdiction of that Court to enable it to render an effective decree.

The only reason put forth in the brief as a basis of this claim is, that the Company did not, in its libel, make an "unqualified and unconditional offer" "to pay into Court for partition among the damage sufferers whatever the Court should determine that the value of its interest in vessel and freight was" (p. 20).

There are several answers :

1. The criticism on the petition has no substance. It did do, substantially, that very thing; for, it claimed the benefit of the limitation given by the Statute (Pet., p. 39) which it could not have without payment or stipulating to pay; it asked the Court to make an appraisement, *i. e.*, to determine the value in question, and it asked the Court to order the Steamship Company to give a stipulation for the payment of that amount into Court.

2. No specific offer in the terms of an offer is required by the rules of this Court to be embodied in the petition.

It is stated by petitioner's counsel (Brief, p. 20) that for want of such an offer, it was decided in Norwich Company *vs.* Wright, that the District Court of Connecticut had no jurisdiction in a proceeding in limitation of liability (new Brief, p. 20–21). This is an error.

The suit before the District Court of Connecticut there referred to was not a proceeding in limitation of liability at all. This Court remarked that the owners of the vessel "have not paid or offered to

pay the fund into the District Court of Connecticut," and proceeded to say that the owners had not made application to the District Court of the Eastern District of New York for an apportionment. This was saying not that the District Court of Connecticut had no jurisdiction, but that no proceeding in limitation of liability had been taken.

3. The petitioner's brief cites the case of *In re* Garnett (141 U. S., p. 1) as being one which made a "proper offer in the libel," and in which the owner proceeded "against his own vessel as well as against damage claimants." (Brief, p. 36.)

But in these particulars the brief is in error. On the contrary, the libel in the limitation proceeding in that case was exactly similar to the petition in this case, so far as it is set forth in the opinion of the Court at pp. 8 and 9. It alleged "the facts and circumstances on which such limitation of liability is claimed," as is required by Rule 54, and also that the fire in question "was caused without his privity or knowledge." And it "concluded with the usual prayer for appraisement of the vessel and a monition to all persons claiming damages to approve."

It did not, so far as appears, contain any offer by the owner to pay anything into Court. It was, therefore, exactly like the petition in the Massachusetts Court in this case.

No process appears to have been prayed for or issued against the vessel. But "an appraisement of the said steamboat and freight was had" and a stipulation for the appraised value was given. It nowhere appears that any of the damage claimants had any notice of the proceedings on that appraisement, nor was it averred to be a "due" appraisement.

Every defect which is claimed to exist in the Massachusetts proceeding existed in that one. And the refusal of this Court to grant the writ of prohibition in that case is an exact authority for refusing it here.

b. It is said that the Massachusetts Court had no

jurisdiction to adjudicate the controversy because it did not have the *res*, the steamship herself.

This is claiming that this Court has no power by its Rules to provide for the substitution of a stipulation for the vessel. If it has the power then certainly when the Court in Massachusetts took the stipulation, it had the *res*.

c. It is also said (Brief, p. 18) that the Massachusetts Court has not acquired personal jurisdiction of Morrison or any other claimant.

It had not as yet acquired such jurisdiction before the service of the monition, but what of that? Having the fund the damage claimants, as the Brief says, p. 36, "would be forced to appear lest they should be estopped."

SIXTH POINT.

The validity of the Massachusetts proceedings and the duty of the District Court to dismiss Morrison's libel when those proceedings were presented to it, are established by repeated decisions of the Court.

The case of The Providence, etc., S. N. Co. *vs.* The Hill Man. Co., 109 U. S., 578, involved every question which is here presented.

If any of these questions were not presented to the Court it may be said of it, as Judge Bradley said in the case of City of Norwich, 118 U. S., 504: "It is true that this particular point was not raised, but the parties in the case were represented by able and experienced counsel, and the point would certainly have been raised if they had regarded it as tenable."

That case was followed by the case of Butler *vs.* Boston S. S. Co. (130 U. S., 527) which is also on all fours with the present case on the main questions.

In that case the owners of the City of Columbus filed a libel in the District Court of Massachusetts praying a limitation of liability and that "to that end" a "due appraisement might be made." The Court caused due appraisement to be made and the owners gave stipulation as required and the monition was issued.

After that a libel was filed, not in another District, as here, but in the same District. It was filed against the owners *in personam*, not, as in this case, against the owners *in personam* and also against the vessel *in rem*. And thereupon the owners set up the limitation of liability proceedings in bar, by filing an exception and plea to the libel. Here the same thing was done by an order to show cause.

In that case as in this the Court dismissed the libel filed after the beginning of the limitation proceedings and the libellants appealed to this Court, raising the question whether the law of limited liability applied to actions for personal injury.

And this Court, having decided that the law did apply, said, "This conclusion is decisive of the controversy arising on the libel of the appellants. For, if the law applies to the case of personal injury, it was *then the duty of the libellants to have appeared in the cause of limited liability instituted by the owners of the vessel.* * * * Had the action of the appellants been first commenced it would have been suspended by the institution of the limited liability proceedings and the very object of those proceedings was not only to stop the prosecution of actions already commenced, *but to prevent other suits from being brought.*"

And these two cases were followed by the case of *In re* Garnett (141 U. S., 1), in which again every question here presented was involved.

An effort is made in the brief for the petitioner to distinguish this case from the case of Prov., etc.,

Co. *vs.* The Hill Man. Co., and it is said (Brief, pp. 33 & 34) that that case differs from the present one in three particulars :

1. That there was a full offer and submission by the petitioner in that case.

But there was here substantially an offer, and actually a submission by the petitioner. The difference is infinitesimal.

2. That in that case several damage claimants within the District of New York were served with notice of the appraisement.

> But no claimant whatever in that case had any notice of the application for the appraisement or of the order that an appraisement be had. That order was as *ex parte* as the issuing of the warrant of appraisement to the marshal in the present case. The notice which the New York claimants had in that case was a notice when the appraisement, *which had been ordered*, would be made; and, moreover, The Hill Man. Co., who were held bound by the proceeding, had no notice whatever.

3. That the Massachusetts plaintiff in that case made no point of not having had notice of the appraisement proceedings or of not having been served with process, but admitted that it had been duly served.

But the decision of this Court was not that the service of the monition or restraining order on that party was essential to the working of the statutory injunction, for it said "It was the duty of the State Court, as well when the proceedings pending in the District Court were pleaded and verified by profert of the record, as when the decree of the Court was pleaded and proved, to have obeyed the injunction of the Act of Congress, which declared that all claims and proceedings shall cease."

There is another difference between that case and this, viz.: In that case the suit in the State Court was brought before the proceeding in limitation of

liability was begun, and the defendants at first only presented to the State Court the record in the Limitation Liability Proceeding, as far as it had then gone. It had not then gone to final decree, but only to appraisement, stipulation, monition, and restraining order. The State Court thereupon decided that the case must be tried. Before it came on for trial, the final decree in the limitation proceeding had been made and was also presented to the State Court.

In the present case there is no final decree in the limitation proceeding.

But Morrison's suit was brought with knowledge of the pendency of the Massachusetts proceeding; and although, if *it had been brought first*, the proper order might have been for a stay of proceedings only until the entry of the final decree, yet, as it was brought contrary to the injunction of the Statute, the proper decree was to dismiss the libel.

SEVENTH POINT.

In conclusion I sum up the whole matter as follows:

1. The Supreme Court had the power to make the Rules which it made.

2. The proceeding in Massachusetts was conducted in accordance with those Rules.

3. The Supreme Court has decided that the giving of a stipulation to pay under the Rules after an appraisement is equivalent to a transfer of the vessel to a Trustee, and that thereupon the statutory injunction against suits against the owner or his vessel comes in force. Therefore the suit brought by Morrison, which was brought after the giving of such stipulation, and with knowledge of the Massachusetts proceeding, was brought in direct violation of the statute.

4. Every objection which is urged in behalf of the Petitioner against the Massachusetts proceeding could be urged with equal force if the Massachusetts Court had in its possession the H. F. Dimock herself, either in the custody of its Marshal or of a Trustee appointed by it.

The objections urged thereon are only objections against the Act as the Supreme Court has construed it and against the power of the Supreme Court to make the Rules which it has made.

5. When the Petitioner's counsel undertakes, as he does in his Fifth Point (Brief, 35–6) to tell how a ship owner may take proceedings to obtain the benefit of the Act, he is compelled to point out, as one way, just the way which was taken in the Massachusetts suit. He says (Par. B.) that the owner may "maintain an apportionment suit under § 4284, making a proper offer in his libel and proceeding against his own vessel as well as against damage claimants."

> Unless a substantial difference can be pointed out between a petition which says: "In order to get the benefit of the act I offer to give a stipulation for such a sum as the Court shall on due appraisement determine to be the value," and one which says, "I ask the Court to give me the benefit of the Act, and for that purpose to make a due appraisement of the value and make an order that a stipulation for such an amount be given," there was what is spoken of as "a proper offer" made by the Petitioner in the Massachusetts suit.
>
> And unless it can be maintained that the appraisement of a vessel by the Court and the giving of a stipulation under its order for the appraised value is not a proceeding against the vessel, unless the vessel shall be at the time in the custody of the Marshal under a process issued against her by name, the proceeedings here had the other requirement

which the Brief considers a necessary prerequisite to obtain the benefit of the act.

Such a proceeding, as the Brief says, "would authorize proceedings according to the mode of procedure prescribed for in *in rem* cases" (which are just the proceedings which were here taken) "and would force damage claimants to appear lest they should be estopped."

And the concession that such a proceeding would be a satisfactory one under the Act and the Rules is a concession that the objections urged in the present case have no substantial foundation. For the damage claimants in that case would be in precisely the situation of the Petitioner.

EIGHTH POINT.

The petition should therefore be denied.

R. D. BENEDICT,
Of Counsel.

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IN THE

Supreme Court of the United States,

OCTOBER TERM, 1892.

HENRY MORRISON

vs.

THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK, and the HON. ADDISON BROWN, the Judge of said Court.

Motion for Leave to File a Petition for Mandamus, and for a Rule to Show Cause or for an Alternative Writ,

And Brief Thereon.

And now, October 17, 1892, comes HENRY MORRISON, a citizen of the United States, and a citizen and resident of the State of Pennsylvania, by ELIHU ROOT, HARRINGTON PUTNAM and SAMUEL B. CLARKE, ESQS., counsellors of this Honorable Court, and moves the Court for leave to file his petition for a writ of mandamus to the District Court of the United

States for the Southern District of New York, and to the Honorable ADDISON BROWN, the Judge of said Court, directing said Court and the said Judge thereof to reinstate a certain cause, civil and maritime (which said Court has refused to entertain and adjudicate), of apportionment of limited liability, pursuant to Section 4284 of the Revised Statutes of the United States, which said cause was commenced by the petitioner filing his libel in said District Court on September 30, 1892, against the steamship "H. F. Dimock," the Metropolitan Steamship Company, owner thereof, and against William K. Vanderbilt and all other persons claiming damages against said steamship company or against said steamship, by reason of a collision which occurred in Pollock Rip Slue, in Vineyard Sound, on the Nantucket Shoals, July 24, 1892, between said steamship "H. F. Dimock" and the steam yacht "Alva," owned by said Vanderbilt, by which collision the "Alva" was sunk and became a wreck, and the property of divers persons on board of her was destroyed; the petitioner suing as a sufferer of loss by the said collision, he having been the master of the "Alva," and his own personal property to the value of upwards of $1,300 having been lost by the collision.

Petitioner also moves for a rule to show cause or an alternative writ.

Process was issued out of said District Court to the Marshal of the Southern District of New York, who by virtue thereof attached said steamship "H. F. Dimock" within his district on said 30th day of September, 1892, and who also personally served said process on said Metropolitan Steamship Company on October 1, 1892. Respondent Vanderbilt entered a voluntary appearance in said cause on October 1, 1892.

On October 7, 1892, the said District Court entered an order (a copy of which and of the opinion recited

therein, and made part thereof is annexed to the petition here), whereby said Court vacated the process, set aside the personal service thereof on the steamship company, released the steamship from the attachment and dismissed the libel "as improperly filed."

The ground on which the District Court proceeded in thus refusing to entertain the petitioner's libel and to adjudicate thereon, was certain proceedings for limitation of liability taken by said Metropolitan Steamship Company in the District Court of the United States for the District of Massachusetts (as stated in the caption of its libel) against William K. Vanderbilt owner of the "Alva." Copies of all the Massachusetts proceedings and of the affidavits by which they were brought before the District Court for the Southern District of New York are annexed to the petition here.

The Massachusetts petition was filed August 16, 1892. Therein the steamship company did not ask for the appointment of a trustee, or convey or offer to convey its interest in said steamship to a trustee, pursuant to Revised Statutes, Section 4285. And it did not in any way surrender said steamship to the custody of said District Court.

On the same day (August 16th) a warrant was issued out of the Massachusetts Court directing the Marshal of that District to cause the "H. F. Dimock" to be appraised by three persons named therein; which warrant was returned by the Marshal August 17th, he certifying that he had notified the appraisers of their appointment, and had requested them to attend to the duties assigned them, and that they had attended, and that they had reported that they appraised the steamship at $80,000, and her freight, pending at the time of the collision, at $2,395.33.

Thereupon, and on the same day (August 17th), the Massachusetts Court made an order for a stipulation to be given by the steamship company in the appraised

amount; this stipulation was given that same day by the steamship company; and on that same day a monition was issued to the Marshal of the Massachusetts District directing him to give notice of the filing of the steamship company's petition and to cite said Vanderbilt and all other persons claiming damages by reason of the collision to appear and prove their claims on or before November 25th, 1892; and on that same day an injunction decree was entered by said District Court, purporting to restrain said Vanderbilt and all other damage claimants from the prosecution of their claims otherwise than in those proceedings.

The copies of the Massachusetts proceedings before the New York Court and the affidavits by which those proceedings were presented further showed to that Court:

A. That the "H. F. Dimock" was never attached by any process issuing out of the Massachusetts Court in the steamship company's proceedings, and that that Court never took said steamship into its custody or assumed control thereof.

B. That neither the petitioner here nor Vanderbilt was ever personally served within the Massachusetts District with any process of the Massachusetts Court issued in said proceedings, they not having been within the State or District of Massachusetts since July 31, 1892.

C. That at the time of the filing of the libel in New York neither the petitioner nor Vanderbilt nor any other damage claimant had entered any appearance in the Massachusetts proceedings.

D. That neither the petitioner nor said Vanderbilt nor any other damage claimant had any notice of any kind whatsoever of the filing of the steamship company's libel or of said appraisement and stipulation proceedings, or of said injunction

proceedings, till after the said injunction decree had been entered and said monition issued.

E. That all the proceedings of the Massachusetts Court from the filing of the steamship company's petition down to the issuance of the monition (including the injunction decree) were wholly *ex parte*. No claimant of damages was required by the Massachusetts Court to be notified in any manner whatsoever, either of the filing of the libel or of the application for the appointment of appraisers, or of the appointment itself, or of the appraisement proceedings, or of the stipulation proceedings, or of the application for the injunction. Neither your petitioner nor Vanderbilt (although named as the principal sufferer by the collision in the steamship company's libel) had in fact any notice of the proceedings or any of them till after the injunction order was made and the monition issued.

F. That, after the *ex parte* proceedings in the District Court in Massachusetts above recited, and before the filing of the libel in the Southern District of New York, the steamship "H. F. Dimock" departed from the District of Massachusetts, and was no longer in said district or subject to the control of the Court of said district, or within the reach of the process of said Court (such departure being without any obligation to return said steamship into said district, and without any leave of said Court obtained or sought).

G. That the only thing left within the District of Massachusetts to be divided among claimants seeking redress for damages through said collision, and subject to be disposed of by the decree of the Massachusetts Court in the proceeding there pending was the said stipulation for $82,395.33.

The affidavits and other papers before the New York

Court also showed to that Court (by your petitioner's allegation in his libel) that the value of the "H. F. Dimock" at the time of the collision, and at the termination of the voyage that she was then making, exceeded $200,000, and her then pending freight exceeded $2,300.

The same papers further showed to the New York Court that in its libel in Massachusetts the steamship company would commit itself only to an allegation that the value of the "H. F. Dimock" and pending freight was "*less than $150,000.*"

Brief on the Motion.

The question presented by this petition is as to the *legal effect* of the Massachusetts proceedings.

The petitioner Morrison had an undoubted right (admitted by the New York Court in its opinion) to bring his suit against the steamship company and against the steamship in the New York Court and have that Court adjudicate it, unless the Massachusetts proceedings have in some way taken that right away from him.

Did those proceedings have that effect?

If those proceedings did have that effect, then Captain Morrison and Mr. Vanderbilt, who was named as a respondent in the Massachusetts case, are left in this position, viz., their statutory right to a proportionate share of the value of the vessel has been destroyed by an *ex parte* proceeding, and there remains to them only the right to pursue in the Massachusetts case a share in a stipulation for $82,395.33, which they say is less than half the value of the vessel, and this result has been brought about by a wholly *ex parte* proceeding without any opportunity to be heard on their part.

The following propositions must all be ruled against the petitioner before the action of the New York District Court can be sustained.

A. Neither the Massachusetts District Court nor this Court under its commission to make rules of procedure in admiralty or otherwise has any lawful authority to deprive any man of any right except upon notice of some kind and an opportunity to be heard.

Windsor vs. MacVeigh, 93 U. S., 274.
The J. W. French, 13 Fed. Rep., 916, and cases cited.
Constitution Art III., § 2.
Constitution, Fifth Amendment.

B. This Court has no lawful power to *enact* in its rules that any proceeding in a District Court shall be a substitute for the statutory conveyance to a trustee under the Limited Liability Act (R. S., Secs. 4283–4289), or that the effect of any proceeding in a District Court shall be to transfer the right of damage claimants from a person or a ship to a fund or bond. All that this Court can accomplish by its rules is to regulate the procedure of the District Court in the exercise of its own inherent powers, as a Court of original jurisdiction in admiralty, subject to all the limitations upon those powers prescribed by the Constitution or by statute or by other substantive law (see remarks of Mr. Justice BRADLEY in *The Benefactor*, 103 U. S., at p. 243).

C. The power to create a substitute, if it exists, must be vested in the District Court as a court of original jurisdiction. But that Court is limited in the exercise of its original powers. By the Constitution the judicial power of the United States, and necessarily of all distributees of that power, is limited to "cases;" and by the Fifth Amendment the Judiciary, as well as all other departments of the Government, are forbidden to deprive any person of "life, liberty or property, without due process of law." An *ex parte* proceeding for

transferring the right of damage claimants from a person or a ship to a fund or bond, in which the persons whose rights are to be affected have no opportunity to be heard, and in which those persons are not brought regularly into court either by voluntary appearance or by personal service of process within the Court's territorial jurisdiction, and in which no property in which those persons are interested, or upon which they have a lien, is taken into the custody of the Court, is neither a "case" nor "due process of law" within the meaning of the Constitution; and this Court has no power by its rules to make such a proceeding either a "case" or "due process of law." A District Court may proceed in admiralty *in rem* and in such a case, if jurisdiction of the *res* be once acquired, any informal notice to persons interested in the *res*, or even the constructive notice implied by the Court's seizure without any actual notice, will suffice to make orders and judgments of the Court effective; but in an *in rem* case (persons interested not having voluntarily appeared) there can be no valid and effective order or judgment till after the *res* is attached by the process of the Court or in some way openly and notoriously taken into the custody of its officers (*Ex parte* Slayton, 105 U. S., 451). Or, the District Court may proceed *in personam*, but in an *in personam* case (in the absence of voluntary appearance) it cannot make any valid or effective order or judgment without actual service of its process on the persons whose rights are to be affected within the territorial limits of its jurisdiction; it cannot proceed effectively without any notice to the persons interested, or by publishing or mailing notices, or by personal service outside of its territorial jurisdiction (Atkins vs. Disintegrating Co., 18 Wall., 306; *Ex parte* Peter Graham, 3 Wash., 456; Pennoyer

vs. Neff, 95 U. S., 714; Ins. Co. vs. Bangs, 103 U. S., 435).

D. The Limited Liability Act (R. S., Secs. 4283–4289), while it indicates plainly enough a result which Congress desired to have accomplished, does not provide any new means or machinery for the accomplishment of that result except through a transfer to a trustee; and it leaves ship owners to ordinary judicial proceedings, with all the existing limitations upon such proceedings, if they would accomplish the intended result otherwise than by a conveyance to a trustee. There is nothing in the Act which authorizes the District Court to proceed (or which authorizes this Court to empower the District Court to proceed) *in rem* except upon a manucaption of the *res*, nor *in personam* except upon actual personal service of process within the territorial jurisdiction.

E. Neither the Statutes of the United States, nor the substantive law of the admiralty, nor the admiralty rules of this Court, properly construed and applied, justify or make effective the proceedings of the Massachusetts Court.

F. The Massachusetts Appraisement was not a *due* appraisement within the meaning of Admirality Rule 54 of this Court.

No notice of the proceedings was given or required to be given to the petitioner or to any representative of his class; not even to Vanderbilt, who was named in the Steamship Company's petition as the chief damage claimant, against whom especially that company wished to have its liability limited. Therefore under Rule 54 the Massachusetts Court was not authorized to allow the stipulation or to make the injunction decree or issue the monition.

G. The fact that the "H. F. Dimock" was taken to New York without any leave of the Massachu-

setts Court, and so removed out of that Court's territorial jurisdiction, and beyond the reach of its process before the return day of the monition, November 25th, and before any person had appeared in the Massachusetts proceeding or been served with process within the territorial jurisdiction of the Massachusetts Court, and without any *res* having been taken into the custody of the Massachusetts Court, is an abandonment by the steamship company of its proceedings in Massachusetts.

These propositions seem to Captain Morrison's counsel to be important and worthy to be argued before this Court, and to be considered and decided by it judicially. We are unable to find that any of them, in any case involving the admiralty rules, has been consciously passed upon by this Court after argument *pro* and *con* in a judicial proceeding.

A case cited by the counsel for the Metropolitan Steamship Company in the argument before Judge BROWN (Providence, &c., Steamship Co. vs. Hill Manfg. Co., 109 U. S., 578) may perhaps in some measure have involved several of the above propositions, but those propositions were not argued in the briefs of counsel, and the opinion of this Court does not show that they were considered by it. At all events, propositions marked "A," "E," "F" and "G" were in no way involved in that case. The transcript of record shows that the most assiduous care was taken in that case, both by the District Court itself and by the lawyers representing the corporation claiming the benefit of the Limited Liability Act, to give actual personal notice and an opportunity to be heard on the appraisement proceedings to all interested persons, and that in fact notice was actually served upon several of the damage claimants within the territorial jurisdiction of the District Court.

On the point that the action of the New York Court amounted to a refusal to entertain the petitioner's cause, the remedy for which is *mandamus*, see :

Ex p. Russell, 13 Wall., 668.
Ex p. United States, 16 Wall., 699.
Ex p. Bradstreet, 7 Pet., 647.
Ex p. Schollenberger, 96 U. S., 369.
Ex p. Roberts, 15 Wall., 384.
Ex p. Parker, 120 U. S., 737.
In re Pennsylvania Co., 137 U. S., 451.

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